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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
LEROY PAYNE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The People of the State of Michigan, Petitioner, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on November 9, 1971.

CITATION OF OPINIONS BELOW

The original Opinion of the Michigan Supreme Court dated November 9, 1971 is reported as 191 N.W. 2d 375, and attached as Appendix A hereto. The Opinion of the Michigan Court of Appeals affirming the judgment of the trial Court is reported at 170 N.W. 2d 523, and attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on November 9, 1971.

Jurisdiction is invoked under United States Supreme Court Rule 19, 28 USCA.

QUESTIONS PRESENTED FOR REVIEW

1. Under the facts of this case, is the second sentence of Defendant fair and in accordance with Due Process?
2. Is this sentence in accord with *North Carolina vs. Pearce*?
3. Should *North Carolina vs. Pearce* be applied retroactively?

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable Constitutional provision involved, in material part, is as follows:

> AMENDMENT XIV Sec 1 . . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

On the night of November 5, 1962, two police officers, Berrien County Sheriff's Deputies Vic Yost and Charles Plummer, were shot and critically wounded on a street in the City of Benton Harbor, Michigan by two assailants. The assailants were, the driver, Leroy Payne, and the passenger, Lionel Bradford, of a vehicle which the deputies had just stopped for a traffic violation. As the officers exited their vehicle and began walking toward the assailants' car, the two men jumped from that car and began shooting at the deputies. Both officers were hit and immediately downed. Leroy Payne then walked back and, while standing next to Deputy Plummer, fired again at him at point-blank range. The assailants then left the scene.

Payne was apprehended at his home later that evening. After improper treatment by some police officers, Payne confessed to having participated in the double shooting.

On December 14, 1962, Payne was arraigned in Berrien County Circuit Court before the Honorable Philip Hadsell,

Circuit Judge, and pleaded guilty to Assault on Officer Vic Yost with Intent to Commit Murder. At that arraignment, an indication of the coerced nature of Payne's confession first appeared in the record. Defendant acknowledged that he had been threatened and abused, but that he was not pleading guilty because of those threats and that abuse, but rather because he was guilty. (See Appendix C)

On March 8, 1963, Judge Hadsell sentenced Payne, noting explicitly in the record the latter's sincere compunction for having committed the offense and his forgiving the officers who abused him as the reasons for his sentence being lighter than it otherwise might have been. He then sentenced Payne to 19-40 years in the penitentiary, suggesting that, should Defendant's contrite attitude continue, he could be released in ten years. (See Appendix D)

Michigan Court of Appeals on May 12, 1967, remanded the Payne case to the Berrien County Circuit Court for an Evidentiary Hearing on the voluntariness of Defendant's statement to the police and his plea of guilty.

Berrien County Circuit Judge Chester J. Byrns held that hearing and subsequently filed an Order on June 21, 1967, finding Payne's confessions and his plea to have been involuntarily given and ordered a trial to be held on the matter. Judge Byrns later ordered a change of venue for that trial to Kent County (Grand Rapids), Michigan, to avoid any possible prejudice to Defendant at trial.

On August 24, 1967, after a three-day jury trial before Judge Byrns, in which the involuntary confessions were not admitted, and in which Defendant took the stand to deny any involvement in the shooting and to establish an alibi defense, Leroy Payne was found guilty again of Assault on Officer Vic Yost with Intent to Commit Murder.

At the sentencing hearing on August 30, 1967, Judge Byrns imposed a sentence of 25-50 years upon the Defendant, reasons for which he gave during that hearing. (See Appendix E)

Two years later, on June 23, 1969, the United States Supreme Court decided the cases of *North Carolina vs. Pearce*, and *Simpson vs. Rice*, both reported at 395 U.S. 711, 89 S. Ct. 2072, 23 L Ed 2d 656, dealing with the propriety

of higher sentences after retrial following reversal of the original conviction.

The Michigan Court of Appeals affirmed the Payne case, including the increased sentence on June 25, 1969. (See Appendix B) On appeal to the Michigan Supreme Court, that Court affirmed Defendant's conviction but did, in a four to three Opinion, remand for resentencing in accordance with the majority's retroactive interpretation of *North Carolina vs. Pearce,* supra. (See Appendix A)

During the course of the Michigan Supreme Court's deliberations, that Court made a formal request of Judge Byrns for an affidavit stating his reasons for imposing the second and higher sentence. Judge Byrns complied. (See Appendix F)

REASONS FOR GRANTING THE WRIT

The imposition of the sentence in a criminal matter is the final, and, for the Defendant personally and for society as a whole, the most critical phase of the criminal prosecution. Confusion on the question of limitations imposed by the Constitution, statutes and higher Court rulings on the sentencing judge is intolerable and must be dispelled.

But confusion exists throughout the Country on the propriety of the higher sentence after a second conviction of a Defendant for the same offense, where the first has been reversed or vacated. *North Carolina vs. Pearce,* supra, laid down a standard which desperately needs clarification.

The Michigan Supreme Court, noting the conflicting interpretations of the *Pearce* case by other state and federal courts has interpreted it in its own unique manner. The Michigan Supreme Court decision was arrived at only after an unusually turbulent period of deliberations, chronicled by Mr. Justice Black in his dissent (joined by Mr. Justice Adams). The four to three split and the sharp cleavage in the supporting rationales indicates the depth of confusion.

In fact, throughout the opinions of the majority and Justice Brennan's and Justice Black's dissent, runs a plea for guidance in clarification in this case and in future ones on similar problems from the United States Supreme Court, which plea this petition, among other reasons stated, seeks to satisfy.

Specifically, the Court below seeks a definitive explanation of how *Pearce* is to be interpreted where, as in the Payne case, it is clear that each judge in a sentencing was confronted with a different situation.

The Leroy Payne that Judge Hadsell sentenced was a contrite man, expressly admitting his crime and forgiving his abusers as he hoped to be forgiven by his victim. Judge Hadsell further had only the vaguest sketch of the details of the crime. In fact, it was limited at the time of plea to the answer "Yes" to the Court's question "Did you, on the fifth day of November, 1962, at the City of Benton Harbor, in Berrien County, Michigan, feloniously assault Victor Yost with a gun, as I understand it — although it is not so alleged — and that you then and there intended to kill and murder?" (See Appendix C)

However, the Leroy Payne facing Judge Byrns, was a man who had been observed by the Judge during three days of trial, had testified, not only showing no compunction, but specifically creating an alibi which the Kent County Jury as well as the trial Judge must have found to be a lie. Furthermore, Judge Byrns heard more details of the crime than had been made known to Judge Hadsell, at least at the plea taking arraignment before Judge Hadsell.

This Court should issue the Writ for six reasons, considered separately below.

1. The higher sentence by Judge Byrns did not deny this Defendant due process.

It was conceded below that the Byrns sentence was within the statutory limits for this crime in Michigan. Thus, this Defendant was informed and knew that he could be sentenced to any term of years up to life. When he pleaded

guilty before Judge Hadsell he accepted the sentence with apparent sincere penitence, and must have known when he appealed his conviction that, should he later lie at the trial he was demanding, if it was discovered he would stand naked before the second sentencing judge as not only a violent felon, but an unrepentant and lying one as well. In addition, he must have known that at such trial there would be the fulest airing of all the details of the shooting.

None of the lower courts found Judge Byrns to be guilty of any vindictive or retaliatory motivation towards this Defendant, and in fact found to the contrary. Judge Byrns himself had vacated Payne's plea, granted the new trial, and granted a change of venue, in addition to suppressing the confession Payne made.

2. Allowing a higher sentence in this type of situation will not improperly "chill" the exercise of a Defendant's right to appeal.

It is a fact common to all human experience that a person called by an authority to answer for his errors, when he admits them in a plea of guilty, will generally try to minimize their importance to the one in authority to hopefully minimize the punishment for them. This is the common experience of trial level judges as well.

Likewise, it is common human experience that a person who, when confronted by clear evidence of guilt, lies to avoid conviction of guilt, evidences a poorer character than one who tells the truth and lets the chips fall where they may. Such common human truths are or should be as well known to those accused with crime. Furthermore, while no one may penalize him for appealing, he himself can be reassessed prior to a second sentencing. That reassessment should reasonably include a review of the crime as proven, and the direct, personal and more extensive contact the new judge would have.

These are not difficult legal concepts that only the legal profession is able to comprehend. They are simple facts of life that mankind as a whole should, and does, understand and live by.

Holding a Defendant to the obligation to tell the truth, if he chooses freely to take the stand in his own defense, is not constitutionally, legally or morally repugnant. The principle has been reaffirmed recently in another context by this Honorable Court in *Harris vs. New York,* ..... US ....., 28 L Ed 2d 1, 92 S. Ct. ..... (1971). It is only right, legally and morally, that the old backroom maxim that a Defendant should be allowed a few lies to protect himself should be forever scotched.

3. North Carolina vs. Pearce allows this second sentence.

The *Pearce* case, relied upon so heavily by the Michigan Supreme Court, when properly understood and interpreted, approves of the sentencing procedure followed by Judge Byrns. His reasons, expressed both at sentencing and later in his affidavit, (Appendix F) are those envisioned in *Pearce*:

A. New information about the nature and details of the crime was presented to Judge Byrns (but not available to Judge Hadsell).

B. Identifiable conduct occurring after the first conviction, consisting in Defendant's change of heart from contrition to denial, his lies under oath, and his behavior for three days at trial and his lack of any contrition prior to the second sentence.

And in addition, the procedural requirements of *Pearce*, and the approved procedure in the *Moon vs. Maryland*, Cert granted (1969), 395 US 975, 89 S. Ct. 2135, 23 L Ed 2d 764; Writ Dismissed (1970), 398 US 319, 90 S. Ct. 1730, 26 L Ed 2d 262, were met. Judge Byrns put on the record at the hearing his reasons for the higher sentence. He later submitted an affidavit amplifying on the pre-Pearce sentencing record he made in far more detail than was done in *Moon*.

4. To construe Pearce so as to prohibit the imposition of a higher sentence in cases similar to Payne would be bad precedent.

To disallow a judge from sentencing a convicted defendant more severely than the same defendant was sentenced in such a situation as Payne presents would be to favor the lying Defendant over the truthful one.

Where a defendant pleads guilty, perhaps as a result of a plea bargain, or for whatever reason, and convinces a judge of his sincere purpose to amend his life, then, upon a retrial granted for whatever reason, he is free to do whatever he wishes without fear of that conduct being held against him at sentencing. He has set a ceiling on his sentence no matter how heinous the crime or how depraved a liar he may subsequently be proved to be.

Such a precedent could produce disastrous and unjust results.

5. North Carolina vs. Pearce should not apply retroactively.

As in *Miranda vs. Arizona,* 384 US 436 (1966), where the Court laid down procedural requirements which law enforcement officers must comply with before a statement which is the product of custodial interrogation is admissible, so in *North Carolina vs. Pearce,* supra, the Court laid down guidelines for the imposition of increased sentences.

The *Miranda* requirements were not made retroactive. *Johnson vs. New Jersey,* 384 US 719 (1966). Nor should *Pearce* be made retroactive. At the time Judge Byrns imposed the sentence under review, *Pearce* had not been decided. A trial judge should not, among the many characteristics he is required to exhibit, be held accountable for not having prescience of a new procedural rule two years later.

6. Conflict exists in the state and federal courts as to the meaning of Pearce and the Michigan Supreme Court is specifically asking for guidance.

As noted in the Opinion of the Michigan Supreme Court, a substantial conflict exists among the jurisdictions, state and federal, as to the meaning of *Pearce.*

Specifically referring to the language "identifiable conduct occurring after . . . the original sentencing" appearing in *Pearce,* a conflict exists as to whether only *conduct* which happens after the original sentencing can be considered in aggravation. See *Barnes vs. US,* (DC Circuit 1969) 419 F 2d 753 (dissenting opinion); *Torrance vs. Henry,* (US DC Edne, 1969) 304 F Supp 725; *Pinkard vs. Neil,* (US DC MD Tenn, 1970), 311 F Supp 711; *Walsch vs. Commonwealth,* (Mass, 1970), 260 NE 2d 911 (dictum at 916). Others hold or indicate that regardless of when the defendant's "identifiable conduct" occurred, if it first comes to a sentencing judge's attention after the time of the first sentencing it may be relied upon in support of a harsher penalty. See, e.g. *United States vs. Kienlen,* (CA 10, 1969) 415 F 2d 557; *United States vs. Gross,* (CA 8, 1969) 416 F 2d 1205; *United States vs. Barash,* (CA 2, 1970) 428 F 2d 328.

Furthermore, the Michigan Supreme Court continually refers in its opinion to hoped-for guidance from this Court. Specifically it seeks a ruling on Pearce's retroactivity (See footnote 2 of the Opinion of the Michigan Supreme Court, Appendix A). It also requests an authoritative interpretation of the same section when it says after noting the above-cited conflicts in decisions:

> "Pending clarification of Pearce's requirements by the United States Supreme Court, we are persuaded that . . ."

Justice Brennan in his dissent for reasons stated therein seeks a complete overturning of *Pearce* on the grounds that it should be *impermissible* to use *any conduct* of a defendant's occurring after the conviction as grounds for a second sentence.

CONCLUSION AND RELIEF REQUESTED

For these six reasons and others which the record, briefs and argument may disclose, the decision of this Court should be to grant the Petition of the People of the State of Michigan and to issue a Writ of Certiorari to review these most important questions.

Respectfully submitted,

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APPENDIX A — OPINION OF THE MICHIGAN SUPREME COURT

(Filed November 9, 1971 — 35/April 1971)

In the Supreme Court of the State of Michigan

The People of the State of Michigan, Plaintiff-Appellee,
vs.
Leroy Payne, Defendant-Appellant.

BEFORE THE ENTIRE BENCH.

T. M. KAVANAGH, C.J.

Defendant-appellant Leroy Payne was convicted in the Berrien county circuit court, by his guilty plea, of assault with intent to murder.[1] On March 8, 1963, he was sentenced by the Honorable Philip A. Hadsell to a minimum of 19 years and a maximum of 40 years in prison. At the conclusion of a hearing subsequently ordered by the Court of Appeals, Payne's guilty plea and a prior confession were determined to have been involuntary and his conviction and sentence were vacated. Motion for a change of venue was granted to Kent county. Payne was reconvicted of assault with intent to murder by a jury in Kent county circuit court. Upon remand to Berrien county, the Honorable Chester J. Byrns, Berrien county circuit judge, who had presided over Payne's Kent county trial, sentenced him to prison for a term of 25 to 50 years with credit for time served and "good time" earned.

The following excerpt from the transcript of appellant Payne's second sentencing is pertinent to his claim, hereinafter discussed, that the sentence imposed was excessive:

> "THE COURT: * * * Mr. Payne, in presiding over your three day trial, I want to tell you that

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[1] MCLA § 750.83 (Stat Ann 1962 Rev § 28.278). The crime is punishable by imprisonment for life or any number of years.

without any reservation, I agreed with the jury's verdict of guilty. I heard your own testimony and I heard your cross-examination, and of course I had an ample opportunity of hearing about your crime which was one of extreme violence. It was senseless; it was cruel, and frankly, I think it reflected a depravity of heart and but not for the grace of God, and the good physical condition of Victor Yost, he survived. He was shot not once, not twice, but three times. Mr. Yost has suffered and is still suffering from the near fatal wounds that you inflicted. You were there when the doctor's testimony reflected that it took some three to four hours spent in surgery trying to save this man's life. Mr. Yost is a brave and able officer and is to be complimented for the excellent and fair manner in which he testified at your trial. And a police officer, whether he may be popular with someone or not is nevertheless a symbol of authority and whoever shoots a police officer in line of duty assaults not only the officer; not only the man, but he assaults all of society because law and order cannot exist unless our officers have the respect and the protection to which they are entitled to. These are precious rights of citizenship which you and I recognize and which would not exist if it were not for officers like Victor Yost who are willing not only to work, but even to die to preserve these rights.

"Assault with intent to murder, especially when a gun is used, is a most serious crime when the victim is a police officer in line of duty. I have felt since I have been judge that crimes of violence are the worst, and I have felt that the use of weapons shows a willfullness and a hatred of which we have too much of in our society today.

"When you appeal, and win a new trial, you wipe clean the previous conviction and sentence. You have then a presumption of innocence which I think the record will bear out and of which I maintain I protected throughout your trial and which your attorney was most zealous in insuring. This Court is no longer bound by the earlier sentence. I cite an authority. Mr.

Reporter, *People* versus Poole, P-O-O-L-E, 7 Michigan, Appellate 291 [sic].

"*In your trial, you might have been acquitted and set free and you also risked a larger sentence with a different judge and this is a different judge between your sentence of five and one half years ago and today; a judge who had a more detailed account of what you did during this new trial than the judge who sentenced you on a plea of guilty and did not have the same opportunity to form impressions nor did my distinguished colleague hear all of the details as it came out in this particular trial.*

"*I am not setting a larger sentence than what I will set in a few minutes because you appealed or because of any added work or expense of a new trial.* This I assure you, and every American citizen has an absolute right to an appeal and to redress. As citizens, they are entitled to use the protection and rights that the law gives them and I would like to think that no judge will be more careful than I to insure this which we reward no man because he pleads guilty and we punish no man because he pleads innocent. *The larger sentence which I impose here is based on the nature of the crime and on the impressions which I formed of you and of the crime for the three days of the trial and what I honestly believe your crime showed of your character and attitude.* Now, I had considered a mandatory life sentence because the maximum term of imprisonment here could be any term of years up to life imprisonment. The only reason that I am not doing this is that I am looking into your past history and I have given this searching thought right up to the very last moment. You have a very poor family background for which you are not to blame, Mr. Payne. Your school reports were good and you served approximately three years in the Army and you earned an honorable discharge while in service although I believe there was a court-martial — wasn't there, Mr. Payne?

"THE RESPONDENT: It was just a minor matter. It wasn't what you would call a court-martial —

"THE COURT: Administrative — company punishment?

"THE RESPONDENT: Yes, sir.

"THE COURT: But you did receive an honorable discharge?

"THE RESPONDENT: Yes, sir.

"THE COURT: And by your own efforts, you completed high school and the employers you had all said that you were a good employee. *I have also checked at the prison where you have been and your conduct there is reported as good during the past four years and some odd months that you have been there and that you have been using the educational and rehabilitation facilities that are available.*

"These are the factors which I have considered on the good side of the ledger which have frankly saved you from a sentence of life imprisonment." (Transcript of sentence, pp 4-9) (Emphasis added.)

The Court of Appeals affirmed (Quinn, P.J. and Holbrook, J.; T. M. Burns, J., dissenting). 18 Mich App 42. Appellant is here on leave granted. 383 Mich 760.

The questions of the propriety and constitutionality of imposing a harsher sentence after a defendant has overturned his conviction on appeal and been reconvicted have long divided American courts. Annotation, 12 ALR3d 978; Van Alstyne, "In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant," (1965), 74 Yale L J 606; Comment (1968), 28 Md L Rev 64. This Court recently considered the problem in *People v. Olary* (1969), 382 Mich 559. In upholding a harsher penalty upon reconviction, the *Olary* majority distinguished the case of *North Carolina v. Pearce*[2] [*Simpson v. Rice*] (1969), 395 US 711 (89 S Ct 2072, 23 L Ed 2d 656), hereinafter discussed, on the grounds that defendant Olary's

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[2] The United States Supreme Court has not yet decided whether *Pearce* is to be applied retroactively. Although the Court twice granted certiorari to consider the question, in each case the writ was subsequently dismissed as improvidently granted. *Moon v. Maryland,* cert granted

> "original sentence was imposed by a justice of the peace, not required to be legally trained, and the second sentence was by a circuit judge, a duly licensed lawyer, after report to him, as provided by statute, by the probation officer as to defendant's background, record and attitude, to enable the circuit judge to fit the punishment to the offender." (*Olary, supra,* at 567.)

Further distinguishing *Pearce, supra,* the Court noted that Mr. Olary's second conviction and resentencing were not occasioned by his having demonstrated to a superior tribunal that his original conviction was tainted with constitutional error but by his decision to assert his right to a trial de novo in the circuit court.[3]

Assuming *Pearce, supra,* was properly distinguished in *Olary, supra,* we do not think the present case is distinguishable because unlike *Olary* this case involves a

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(Footnote 2 continued)

(1969), 395 US 975 (89 S Ct 2135, 23 L Ed 2d 764), writ dismissed (1970), 398 US 319 (90 S Ct 1730, 26 L Ed 2d 262); *Odom v. United States,* cert granted (1970), 399 US 904 (90 S Ct 2203, 26 L Ed 2d 559), writ dismissed (1970), ... US .... (91 S Ct 112, 27 L Ed 2d 122). We decline to predict the high Court's answer to the question of *Pearce's* retroactive or prospective application, but we will apply *Pearce* in the present case in order to instruct our trial courts as to the Michigan interpretation of an ambiguous portion of *Pearce,* discussed *infra,* pending clarification by the United States Supreme Court.

[3] It is noteworthy that *Olary, supra,* involved a misdemeanor. While all criminal defendants are entitled to due process of law, our Constitutions require stricter standards and procedures in many respects when the offense charged is serious and threatens the defendant with more severe punishment. See, *e.g., Duncan v. Louisiana* (1968), 391 US 145 (88 S Ct 1444, 20 L Ed 2d 491), rehearing den 392 US 947 (88 S Ct 2270, 20 L Ed 2d 1412). But see *Wood v. Ross* (CA 4, 1970), 434 F2d 297, involving harsher sentence on appeal and de novo trial in circuit court, than that imposed in justice court.

felony conviction, a reversal by way of appeal because of constitutional error, and disparate sentences, imposed by judges of the same level and court, both of whom were provided with the statutory presentencing reports.[4] We, therefore, proceed to consider appellant Payne's contention that the imposition of a harsher sentence following his successful appeal and reconviction was violative of the 14th Amendment due process standards and procedures laid down in *North Carolina v. Pearce, supra.*[5]

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[4] Nor is the present case distinguishable from *Pearce, supra,* because Mr. Payne's original conviction was by guilty plea, that is, because only the second sentencing judge had the opportunity to gain impressions of Mr. Payne and his crime throughout a trial. In *Pearce's* companion case, *Simpson v. Rice,* Mr. Simpson's original convictions were by guilty plea; he was subsequently reconvicted by a jury, whereupon he received a stiffer sentence. Whatever our own views are, we cannot ignore the fact that the United States Supreme Court did not find this difference between *Simpson* (one trial) and *Pearce* (two trials) worthy of distinguishing note. The holding of the Court as regards harsher sentence upon reconviction applied fully to both cases.

[5] My Brother Black asserts, *infra,* p. ....., that *Pearce* is "doubtful fard," that is, lacking in precedential force, because Mr. Justice Stewart's opinion for the Court failed to gain the unreserved endorsement of at least five Justices. The following quotations from two of *Pearce's* concurring opinions demonstrate that the signers thereof declined to give Mr. Justice Stewart's opinion their unreserved endorsement primarily because they would go further to declare that the United States Constitution absolutely forbids the imposition of a harsher sentence upon reconviction:

"Although *I agree with the Court as to the reach of due process,* I would go further. It is my view that if for any reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy." (Opinion of Mr. Justice Douglas, joined by Mr. Justice Marshall, at pp 726, 727. Emphasis added.)

In *Pearce* the United States Supreme Court held, *inter alia,* that neither the equal protection clause of the 14th Amendment nor the double jeopardy clause of the 5th Amendment imposes an absolute bar to a more severe sentence upon reconviction. But the Court further held that the due process clause of the 14th Amendment requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part

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(Footnote 5 continued)

"*Were these cases to be judged entirely within the traditional confines of the Due Process Clause of the Fourteenth Amendment, I should, but not without some difficulty, find myself in substantial agreement with the result reached by the Court.* However, the Court today, in *Benton v. Maryland* [(1969), 395 US 784 (89 S Ct 2056, 23 L Ed 2d 707)] * * * has held, over my dissent, that the Double Jeopardy Clause of the Fifth Amendment is made applicable to the States by the Fourteenth Amendment Due Process Clause. * * *

"Given *Benton,* it is my view that the decision of this Court in *Green v. United States,* 355 US 184 (1957) [78 S Ct 221, 2 L Ed 2d 199], from which I dissented at the time, points strongly to the conclusion, also reached by my Brother Douglas * * * that the Double Jeopardy Clause of the Fifth Amendment governs *both* issues presently decided by the Court. * * *

"I therefore conclude that, consistent with the Fifth Amendment, a defendant who has once been convicted and sentenced to a particular punishment may not on retrial be placed again in jeopardy of receiving a greater punishment than was first imposed." (Opinion of Mr. Justice Harlan, beginning at p 744. Emphasis partly in original, partly supplied by the present writer.)

Thus the holdings of six of the eight Justices who sat in *Pearce* firmly support the position we take in the present case. Since three of the Justices who declined to sign Mr. Justice Stewart's *Pearce* opinion think the United States Constitution absolutely forbids imposition of a harsher sentence upon reconviction, the present opinion can hardly be said to "outrun" the United States Supreme Court. See Justice Black's opinion, *infra,* p. .....

in the second sentence he receives; and the defendant must be freed of the apprehension of such retaliatory motivation on the part of the sentencing judge. Resolution of the Federal constitutional question raised by appellant Payne requires interpretation and application of the following language from *Pearce, supra*:

> "A trial judge is not constitutionally precluded • • • from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' *Williams v. New York*, 337 US 241, 245. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York, supra*, that a State may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.' *Id.*, at 247." (at p 723)
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> • • •
>
> "In order to assure the absence of such a motivation [*i.e.*, vindictiveness], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." (at p 726)

The above language raises the following question: May the judge who imposes a harsher sentence upon reconvic-

tion rely on information not possessed by the first judge regarding defendant's conduct prior to the time of his first sentencing? If not, the sentence imposed by Judge Byrns was excessive because it appears his only knowledge of Payne's conduct *after* the first sentencing was that he had earned "good time" while in prison and had been taking advantage of prison educational and rehabilitation facilities. Judge Byrns stated, *supra,* that he based his decision to impose a stiffer sentence on impressions of Payne and his crime formed during the trial.

The question arises primarily because of ambiguous language in the following sentence from *Pearce, supra,* quoted earlier:

> "Those reasons [for imposing a harsher penalty] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." (at p 726).

Does "occurring after * * * the original sentencing" refer to defendant's "identifiable conduct" or to acquisition of "objective information" regarding his conduct before or after original sentencing? Since *Pearce* was decided, lower courts have split over interpretation of the above language. Some opinions hold that only *conduct* of the defendant occurring after his original sentencing may be relied upon by the sentencing judge who imposes a harsher penalty. See, *e.g., Barnes v. United States* (DC Cir, 1969), 419 F2d 753 (dissenting opinion); *Torrance v. Henry* (USDC EDNC, 1969), 304 F Supp 725; *Pinkard v. Neil* (USDC MD Tenn, 1970), 311 F Supp 711; *Walsh v. Commonwealth* (Mass, 1970), 260 NE2d 911 (dictum at 916). Others hold or indicate that regardless of when the defendant's "identifiable conduct" occurred, if it first comes to a sentencing judge's attention after the time of the first sentencing it may be relied upon in support of a harsher penalty. See, *e.g., United States v. Kienlen* (CA 10, 1969), 415 F2d 557; *United States v. Gross* (CA 8, 1969), 416 F2d 1205; *United States v. Barash* (CA 2, 1970), 428 F2d 328.

The conflicting interpretations of the *Pearce* requirements were not resolved by the opinion of the United States Supreme Court accompanying its dismissal of a writ of certiorari in *Moon v. Maryland, supra.* Certiorari had been granted to consider whether *Pearce, supra,* should be applied retroactively. In dismissing the writ as improvidently granted the Court said:

> "As an appendix to its brief, the respondent has filed an affidavit of the judge who presided at the second trial, setting out in detail the reasons he imposed the 20-year prison sentence. Those reasons clearly include 'objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.'" (at p 320)

We have obtained a copy of the referenced trial judge's affidavit. Unfortunately, for our purposes, the Maryland judge who resentenced Mr. Moon considered conduct which occurred after the first sentencing. Therefore, *Moon* doesn't tell us whether *Pearce* allows a harsher sentence even though there is no (known) conduct of the defendant occurring after the first sentencing which would support a stiffer sentence.[6]

Pending clarification of *Pearce's* requirements by the United States Supreme Court, we are persuaded that those courts are correct which have interpreted *Pearce* to require that the "identifiable conduct" of the defendant upon which

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[6] Similarly the per curiam opinion accompanying dismissal of the writ in *Odom v. United States, supra,* does not answer our question. The opinion gives as the reason for dismissing the writ as improvidently granted that the order of the district court denying Mr. Odom's motion to set aside his second sentence "makes it clear that the greater severity of the second sentence was based on conduct on the part of the petitioner occurring after the time of the original sentencing proceeding, and that the new information was specifically referred to at resentencing." (*Odom, supra,* at p 112.)

a resentencing judge relies in imposing a stiffer sentence must have occurred *after* the first sentencing.[7] That the *Pearce* Court intended this result is evidenced by Mr. Justice White's one sentence opinion advocating the opposite result:

> "I join the Court's opinion except that in my view Part II-C [standards and procedures governing harsher sentence upon reconviction] should authorize an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding." (*Pearce, supra,* at p 751.)

Furthermore, our interpretation is in accord with the grammar of the ambiguous *Pearce* language. "Information" does not "occur," it is obtained. "Conduct" "occurs."

We conclude, and hold, that the imposition of a harsher sentence upon reconviction following appellant Payne's successful appeal was constitutionally impermissible because the record of the second sentencing does not disclose "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." (*Pearce, supra,* at p 726.)

Our disposition of the above discussed issue renders unnecessary consideration of appellant Payne's contention that the possibility of a harsher sentence upon reconviction unduly chills the exercise of the right to appeal one's conviction granted by the Michigan Constitution of 1963, art 1, § 20.[8] We have carefully examined appellant Payne's

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[7] Justice Black's assertion, *infra,* p. ....., that no Justice dissented from Justice Dethmers' contrary handling of *Pearce* in *Olary* is misleading for two reasons. First, the two *Olary* dissenters did not reach the *Pearce* issue. Second, since Justice Dethmers first took great pains to distinguish *Pearce* in *Olary,* his subsequent interpretation of *Pearce's* requirements was clearly dicta and not controlling here.

[8] See Judge T. M. Burns' dissenting opinion below. 18 Mich App 42, 46.

other allegations of error and find them to be without merit.

Since this opinion was written, the case has been reheard and the records supplemented by additional statements by the trial judge. Nothing new, disposition-wise, has been added. The result remains the same.

The case is reversed and remanded to the Berrien county circuit court for resentencing in accordance with this opinion.

(s) Thomas M. Kavanagh

(s) Thomas Giles Kavanagh

(s) John B. Swainson

(s) G. Mennen Williams

35/April/1971

BEFORE THE ENTIRE BENCH

BRENNAN, J.

I agree with the Chief Justice's analysis of the *Pearce* decision.

I believe, however, that the United States Supreme Court was very, very wrong — dangerously, and illiberally wrong — in concluding that a harsher penalty could be imposed upon a defendant for "* * * conduct * * * occurring after * * * the original sentencing * * *."

Courts are empowered to mete out sentences for the conduct of which the defendant stands convicted. That conduct, and only that conduct, has been established factually in the manner required by constitutional due process.

Any other, subsequent, conduct with which the defendant has not been duly charged, and of which he had not been duly convicted according to the Constitution and laws of the State and the Nation simply *cannot* be made the basis for depriving a person of his liberty.

The Thirteenth Amendment makes the point perfectly and abundantly clear.

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." US Const, Am 13, §1.

To the extent that the *Pearce* case stands for the proposition that a harsher sentence, imposed on re-trial as a punishment for, or a deterrent to, the exercise of the right of appeal, it is good, sound constitutional law.

To the extent that *Pearce* ignores the plain command of the Thirteenth Amendment, it is a horrible mistake, and one which every state and Federal judge, endowed with the gift of conscience ought to call forceably to the attention of our constitutional superiors on the United States Supreme Court.

As to this case of *Payne*, I am satisfied that the candid statement of the circuit judge, made on the record at the time of re-sentencing is free of any taint of vindictiveness, and that the sentence should be upheld.

(s) Thomas E. Brennan

35/April, 1971
No. 52618-½

BEFORE THE ENTIRE BENCH

BLACK, J. (for affirmance)

ON REHEARING

Mr. Payne's appeal, granted January 21, 1970 (383 Mich 760), was assigned to then Associate Justice T. M. Kavanagh and duly submitted last year. December 16, 1970 the assignee Justice submitted to this then manned Court of six an opinion calling for reversal and resentencing in accordance with its tenor. That opinion, since withdrawn, will *not* appear in our reports.

In effort to attain a prompt decision, by the Court before whom the appeal had been submitted, the writer

dropped other work and drafted an opinion standing for affirmance. That opinion was delivered to the other Justices December 22, 1970. It *will* appear in our reports, *infra* beginning at ..... It communicates adequately my then and present view of Circuit Judge Byrns' eminently permissible and perfectly constitutional action when, upon full-fledged trial of Mr. Payne before a jury of another county than the county of indictment (ordered upon Mr. Payne's motion for venue change), Mr. Payne was convicted again of assault with intent to murder and sentenced (August 30, 1967) to 25 to 50 years imprisonment with credit allowed for time served and "earned"; distinguished from his original sentence by Judge Hadsell, in 1963, to 19 to 20 years imprisonment.

There is more to report. December 30, 1970 Justice T. M. Kavanagh "held" decision of the appeal, thus automatically eliminating Justice Dethmers from participation, the latter's term then being due for end in less than 48 hours. Next came a memorandum from newly elected Chief Justice Kavanagh dated January 22. With it he submitted to us a substituted opinion, likewise standing for reversal for resentencing. The memorandum concluded:

> "Since we are apparently split 3-to-2 on this case, we should consider resubmission to the entire present Bench in hopes of obtaining a sounder precedent. I would anticipate little inconvenience to the litigants in the event of resubmission, since the case was originally submitted on briefs."

The next internal event was that of submission by the present writer, to the other Justices, of a memorandum dated March 1. It reads:

> "What is introduced below repeats the resolution offered orally on December 30. This one is in writing, for reference in a forthcoming supplemental opinion. Counting procedurally on *Moon v. Maryland* [398 US 319; 26 L ed 2d 262] and *Odom v. United States* [..... US .....; 27 L ed 2d 122] I wish to have the Court resolve:

"That we request through the clerk submission by Judge Byrns of an affidavit supplying, 'in detail' as Judge Pugh did in *Moon v. Maryland* (June 8, 1970), his reasons for imposition of the August 30, 1967 sentence of Mr. Payne, so that this Court may determine whether, within Justice Stewart's allegedly 'ambiguous' opinion of *North Carolina v. Pearce*, 395 US 711, 23 L ed 2d 656, 'there was a retaliatory motivation on the part of the sentencing judge.'

"The new members of the Court will note that *Pearce* was decided June 23, 1969, nearly two years *after* Mr. Payne was sentenced the second time, and that USSC has twice since, over objection of Justice Douglas, refused to say that *Pearce* is retroactive in effect."

That resolution came to adoption by the Court March 2. On the same date the Court ordered — *sua sponte* — a rehearing of Mr. Payne's appeal. The order for rehearing concluded with provision that "the cause [be] submitted forthwith, without additional briefs or argument."

Pursuant to direction and on April 19 our clerk wrote Judge Byrns as follows:

"The Court has asked me to refer you to *North Carolina v. Pearce*, decided June 23, 1969 (23 L ed 2d 656); *Moon v. Maryland*, decided June 8, 1970 (26 L ed 2d 262) and *Odom v. United States*, decided November 9, 1970 (27 L ed 2d 122), and to the fact that you presided at Mr. Payne's Kent county trial in August of 1967 and were the second sentencing judge.

"The question in this Court for review on rehearing ordered March 2 is whether considering Mr. Payne's sentence by Judge Hadsell in 1962 and the somewhat greater sentence imposed by you August 30, 1967 following the Kent county trial, the second sentence was 'harsh' within the rule of *Pearce*. You will perceive how and why this question has arisen upon examination of *Pearce*, *Moon* and *Odom*.

"Your reasons given (prior to handing down of the 3 cited cases) for the sentence imposed August 30, 1967, appear in the transcript of sentence filed in your court on September 8, 1967. The Court wishes now that you prepare and submit an affidavit, procedurally as was submitted to the Supreme Court by Judge Pugh in the *Moon Case,* in order that the Court may determine whether there was or was not the vindictiveness to which the Supreme Court addressed itself in *Pearce.*

"In order that you may ascertain precisely how this was handled in *Moon* you are furnished herewith a copy of Judge Pugh's affidavit, sworn to by him October 1, 1969."

May 10 Judge Byrns responded by letter to the clerk, enclosing an affidavit attested by him. The affidavit is much the same as that which the United States Supreme Court accepted and acted upon, after grant of certiorari for review of *Moon v. Maryland,* June 8, 1970, 398 US 319, 90 S Ct. 1730, 26 L ed 2d 262. It reads:

"In accordance with the direction of the Supreme Court of Michigan in the above cause, I, Chester J. Byrns, being first duly sworn, say that:

"1. I am and have been since January, 1, 1967, one of the judges of the Second Judicial Circuit of Michigan (Berrien County).

"2. Leroy Payne, defendant-appellant in the above cause, pled guilty on December 14, 1962, before the Honorable Philip A. Hadsell, Circuit Judge, now retired, to the crime of assault with intent to murder, and was sentenced to 19-40 years.

"3. On June 15, 1967, I suppressed a confession of Mr. Payne, set aside his guilty plea and granted him a new trial based on his claim that improper means were used by the police to secure his confession which he claimed was involuntary.

"4. On August 4, 1967, I granted Mr. Payne's motion for a change of venue and transferred and heard the jury trial in Grand Rapids (Kent County), Mich-

igan, which resulted in a verdict of guilty of assault with intent to commit murder.

"5. During said trial I had the opportunity, which Judge Hadsell did not, to observe defendant for three days and, far more important, to hear many more of the details of the crime and Mr. Payne's participation in it than Judge Hadsell who, as the arraignment transcript shows, had only inquired of defendant whether the defendant committed the assault against Officer Yost with a gun with intent to kill and murder, to which Mr. Payne answered only 'yes.'

"6. Unlike Judge Hadsell who had Mr. Payne before him for only a few minutes at the time of plea and again at sentence, I had the opportunity to observe and hear Mr. Payne who took the witness stand and who was examined and cross-examined extensively. Mr. Payne's story and claim in trial of not being at all involved in the crime was in direct conflict with what he told Judge Hadsell both at arraignment and at the plea of guilty where he not only admitted his crime but expressed sorrow and regret for it and showed thereby a remorse for his crime. At time of sentence Judge Hadsell said he believed Mr. Payne's claim of regret. At the time of sentencing by me on August 30, 1967, when given the opportunity to state anything he wished me to consider, Mr. Payne replied, 'Nothing.'

"7. At the jury trial before me Mr. Payne repeatedly denied under oath not only shooting Officer Victor Yost, but claimed under oath he was home with his wife and had while waiting earlier at church for his children at Sunday School gotten the gun used in the Yost shooting as security for a $3.00-loan to an unknown stranger and this gun and Payne's car were allegedly stolen the night of the shooting. This court believes this was a tissue of lies and so did the jury.

"8. Frankly, I was then and am now of the opinion that Mr. Payne repeatedly lied under oath at the trial before me. While a sentencing judge receiving a guilty plea and an expression of regret from a defendant might find remorse and a resolution to rehabilitate from such a defendant, which might limit the sentence,

I could not so find this in Mr. Payne. I was charged with the judgment of determining how long an individual should be confined, which in turn depends on my judgment of his character and his real desire for rehabilitation according to the facts and impression I receive.

"9. At the trial of People v. Lionel Bradford (Berrien circuit No. X-768, Michigan Supreme Court No. 52072), a co-defendant with Payne, who was found guilty by jury of assault with intent to murder Charles Plummer (who was shot along with Officer Yost but who was out of the country at the trial of Mr. Payne) Plummer testified (Bradford trial transcript pp 49, 50, and 180) that while he (Plummer) was wounded and lying on the ground, Mr. Payne came back and stood by the left fender of the car and deliberately fired right at him.

"10. Payne testified at Bradford's trial (February 4, 1963) that Lionel Bradford and Payne were driving a 1955 blue and white 2-door Pontiac on November 5, 1962 in the early morning hours. After having broken into a restaurant in South Bend, Indiana, and a clothing store near Benton Harbor, Michigan, Payne testified that he and Bradford were stopped by a police vehicle on M-139. Bradford had told Payne he 'would not be taken.' As they stopped, Bradford and Payne jumped from their vehicle and began firing at the two officers, hitting both of them.

"Payne remembered going back to one of the officers but couldn't recall exactly what then happened. Both men subsequently jumped into their car and fled, Payne giving his gun to Bradford in a ravine and returning home where he (Bradford transcript pp 45-60) was subsequently arrested.

"On September 2, 1965, nearly three years after his sentence by Judge Hadsell and about two years before I granted him a new trial, Leroy Payne signed an affidavit supporting an appeal of Bradford claiming he gave 'false testimony' at the Bradford trial. He said that the only reason he testified at that trial was due to fear of the police, that Bradford never ad-

mitted committing crimes, and that Bradford had denied being present when the officers were shot. Further, Payne swore in his affidavit he had hardly known Bradford prior to being arrested, and that he had not been with Bradford on either the date of the shooting or the day before.

"11. At the Payne trial before me, in far greater detail than would have been present in a plea of guilty, it was established before me beyond a reasonable doubt that Mr. Payne had participated in the deliberate, cold-blooded attack upon and wounding three times of Officer Yost under conditions that Mr. Yost could not properly defend himself, which I felt then and do now showed a depravity of mind.

"12. I had the details of the nature of the wounds and the medical fight to save Officer Yost's life from Mr. Yost and from his surgeon, Dr. Robert Reagan, as well as the residual and continuing damage to Mr. Yost, which Judge Hadsell on a plea of guilty would not have had.

"13. I had as a result of the trial and many facts brought out therein the conclusion that only by divine providence and not because of Mr. Payne was the life of Officer Yost saved.

"14. As stated at the time of sentencing, my increase in sentence to 25-50 years was not because the fendant asked for and got a new trial (which I granted) or a change of venue (which I granted), but because of the conditions and facts stated by me to Mr. Payne at the time of sentencing as well as the above matters which I do not believe were all known to Judge Hadsell.

"15. Further deponent says not.

[Subscribed, sworn, etc.]"

The next event of the appellate series was delivery to the other Justices, by the Chief Justice, of his third opinion for reversal. That was done under date of September 21. Presuming at this writing that this third review is due to be the opinion of the Court, I respond with the foregoing plus the ensuing presents this 14th day of October.

Between appropriate separating lines my 1970 opinion for affirmance, mentioned at the outset, is inserted here.

[Title of Court and Cause, October 1970 Term No. 33]

BEFORE THE ENTIRE BENCH (except Kelly, J.)

BLACK, J.

Defendant Payne demands on appeal that we compare his 1962 sentence upon plea of guilty in Berrien county, with his second sentence upon conviction by a jury in Kent county after change of venue, and that we find by the doubtful faird of 4-2-1-1 *North Carolina v. Pearce* (1969), 395 US 711 that the second sentence was unconstitutionally more "harsh" than the first.*

In corresponding vein we considered *Pearce* in *People v. Olary* (October 6, 1969), 382 Mich 559, 565-568, wherein no member of the Court dissented from Justice Dethmers' handling for us of the issue posed by *Pearce*. In *Olary* our rather unenthusiastic view of *Pearce* was summed up (p 566):

> "Then the rather amazing requirement seems to be expressed that, if a greater sentence is imposed after the second conviction, the sentencing judge must cause to be placed in the record his reasons for so doing, based on conduct of the defendant occurring after the

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* By plea of guilt to the charge of assault with intent to murder, and later by jury verdict, Mr. Payne's crime consisted of the cold-blooded shooting of police officer Yost as the latter approached Payne's automobile; the officer in a scout car having previously signaled the Payne car to a stop. Not one of Payne's 3 shots missed. One bullet crippled Yost's gun arm; hence he was unable to draw his gun and get into action. Payne and his companion drove away but were apprehended later. Yost was critically wounded and subjected to major surgery to save him. He managed to survive and testify years later.

first sentencing or, at least, on subsequent information coming to the judge after the first sentence."

Proceeding from *Olary* to today's question: I am unable to find that a majority of the Court, seated for determination of *Pearce,* committed the Court (if indeed there was *any* commitment beyond affirmance) to anything constituting a dependable precedent except that which, in full paragraphic context, was written by Mr. Justice Stewart (p 726):

> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

Justice T. M. Kavanagh, writing to reverse for resentencing, has plucked from the middle of *Pearce's* foregoing paragraph the second sentence thereof. Then, upon allegation and judgment that the sentence is grammatically "ambiguous," our Brother finds that the defendant's "identifiable conduct" must be "bad," and recorded that way, in order to satisfy the constitutional requirements of *Pearce's* quoted paragraph.

Now I cannot object legally to following the decisions of our superior, the United States Supreme Court, whatever we may think of such of its decisions as may dictate the criminal processes of the States. But I do of right protest the gratuitous insertion, in a short-of-majority opinion released by the Supreme Court, of an additional qualifying word or words which the endorsers of that opinion chose not to wedge in. And when that is attemptedly done by a subordinate Court bent on a this way or that way "interpretation" of an opinion of the Supreme Court, I not only object but except. Let us interpret and apply *all*

of Justice Stewart's words as they are, not as we might wish he had written them.

I shall presently return to this "identifiable (bad) conduct" view of Justice Stewart's opinion. For the merits of the constitutional question, however, the opinion of Division 3 (18 Mich App 42) expresses best the view I take of Judge Byrns' assiduous care of Mr. Payne's right as claimed by him under *Pearce,* and of the Judge's fulfillment of judicial duty in such regard. The following is adopted (pp 45, 46):

> "A trial affords more opportunity to hear all details, to observe and judge a defendant than does a summary plea proceeding, a fact noted by Judge Byrns. The trial judge noted the right of every citizen to seek appellate relief and the fact that obtaining such relief should in no way affect a subsequent sentence. The trial judge then stated that the sentence he was about to impose was not because defendant had appealed but by reason of the nature of the crime and impressions formed of defendant during 3 days of trial. The trial judge noted that the statute under which defendant was convicted authorized a life sentence or any term of years, and except for defendant's past history (poor family background, good school, service and prison records), a life sentence would have been imposed."*

Judge Byrns' "reasons," for the sentence ordered after the jury trial (25 to 50 years with allowed credit for time served and earned "good time"), compared with the sentence meted out years before on Mr. Payne's plea of guilt (19 to 40 years), need no expatiation. Read in continuant context, the Judge's discourse portrays something more than due care in effort to conform with the rule of *Williams v. New York* (1949), 337 US 241, 245 which, later, was expounded in *Pearce* at 723-726.

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* The complete text of that which is necessary to determine whether Judge Byrns did or did not supply the record, required by Justice Stewart's opinion as quoted, appears in Justice T. M. Kavanagh's opinion, ante at .....

From that conclusion I turn to the 3 federal *appellate* decisions (not District Court opinions or conceded dicta) which Justice T. M. Kavanagh admits are opposed to the application he, per the above, would make of the quoted "ambiguous" sentence. The 3 are *United States v. Kienlen* (CCA 10, 1969), 415 Fed 2d 557; *United States v. Gross* (CCA 8, 1969), 416 Fed 2d 1205 and *United States v. Barash* (CCA 2, 1970), 428 Fed 2d 328.

Pick up the first, *Kienlen*. The unanimous opinion there provides plain reason why the 11 federal circuits are thus far loath to speed ahead of *Pearce*. Read first the sentencing judge's reasons for stepping up Kienlen's sentence (pp 559-560) from 12 years to 18 years, in array with those which Judge Byrns declared upon sentence of Mr. Payne. Doing so, note the striking emphasis upon judicial consideration of *information gained by and upon actual trial* of the facts, compared with that which in each instance was provided by the earlier plea. Finally, consider Chief Judge Murrah's conclusion of *Kienlen* — for the Court (p 560):

> "After a brief colloquy, he [the sentencing judge] further noted, 'I want it clearly understood that what I have said with respect to increasing the sentence or, rather, imposing a more severe sentence than I had before, is not to be taken by anyone as punishment for the exercise of constitutional rights by this defendant.'
>
> "In our judgment, this meets the Pearce standard. Naturally, the statement that the trial judge was not penalizing the defendant for exercising his constitutional right to appeal is not conclusive. But it is indicative of the sentencing climate. The decision was clear and rational. Finding this sentence altogether compatible with Pearce, we need not consider the possible retroactivity of Pearce. See Moon v. Maryland, cert. granted 395 US 975, 89 S Ct 2135, 23 L Ed 2d 764 (1969) on the issue of Pearce's retroactivity."

The foregoing brings to the fore that which the courts of the States must ever bear in mind; that since there is no compulsion, they of right and good sense should never

undertake to gallop ahead of the United States Supreme Court, as legal skirmishers, into the uncertain and dangerous brambles of federal criminal justice. Subordinates never know whether that top Court of a State or of the Nation will provide support later; a fact learned anew when our opinion of *People v. Charlie Lee Woods* (cited post), was held up from February 14 to August 4, 1969, awaiting *Jenkins v. Delaware* (1969), 395 US 213.

Here our constitutional position, vis-a-vis a decision of the United States Supreme Court we are warned to follow, should not be forgotten as all view the occasional error of proceeding ahead of our superior as federal questions arise, say as chronicled anent California in the separate opinion of *People v. Taylor* (1970), 383 Mich 338, 367-372. "Made in Washington," as cynics currently describe the products of Congress, applies as truly but more respectfully to the decisions of the United States Supreme Court. We need not buy them nor employ them, unless they bear that warranty of fitness which under Article VI is made negotiable by the unreserved endorsements of 5 or more of the Justices. *Pearce* is not so endorsed.

Ranking surely with Chief Justice Marshall's mighty phrase, admonishing that "We must never forget, that it is a *constitution* we are expounding." (*McCulloch v. State of Maryland* (1819), 17 US at 407), Justice Adams has written for us an equally enduring deterrent warning. Appearing in *In Re Apportionment of Legislature* (1964), 372 Mich 418, 473, it is that he did not "conceive it to be the proper duty or function of this Court to attempt to outrun the Supreme Court of the United States." Having admired crescently the penetrating omniscience of my Brother's thought in such regard, due respect has since been paid thereto. See *Muskegon Prosecuting Attorney v. Klevering* (1966), 377 Mich 666, 672; *People v. Mallory* (1967), 378 Mich 538, 584,* and *People v. Charlie Lee*

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* My footnote in *Mallory* concluded:

"It is better, say I, that a subordinate court risk direct reversal than risk indictment and conviction for having predicted by a soothsayer's judgment what ultimately does not come to pass."

Woods (1969), 382 Mich 128, 129. On the last cited occasion the *entire* Court, Justices T. M. Kavanagh and Adams included, joined in the deserving accolade.

The issue arising from Mr. Payne's 1967 sentence may be summarized best by calling attention to the Supreme Court's most recent duel over these allegedly "harsh" second sentences to imprisonment. That duel appears in 5-1-1-1 *Moon v. State of Maryland* (June 8, 1970), ... US ....., ..., where the writ theretofore granted *Moon* was dismissed "as improvidently granted." Five members of the Court declared that "the dispositive development is that counsel for the petitioner has now made clear that there is no claim in this case that the due process standard of *Pearce* was violated." That conclusion was reached upon strength of Moon-counsel's statement renouncing any claim "that Judge Pugh was vindictive."

If such is to be the "dispositive development" of cases as at present bar, then let it be noted that nowhere in the brief of Mr. Payne does there appear the slightest suggestion or hint that Judge Byrns was "vindictive"; also that this case was received on briefs with oral argument waived. Again, is it not in order that this Court of a State should not attempt to manufacture more rights from the Bill of Rights, and that it should attend in that regard the leadership of the United States Supreme Court?

No other question posed for review requires discussion. I vote to affirm.

On rehearing there is no more that needs saying than this:

First: The Supreme Court, having granted Mr. Moon's petition for certiorari, accepted and acted affirmatively upon sentencing Judge Pugh's October 1, 1969 affidavit. That affidavit, a copy of which I have attached as an appendix so that concerned outstate as well as instate counsel may compare it conveniently both with Judge Byrns' sentencing statement (ante at .....) and Court-requested affidavit, persuaded the Supreme Court that Judge Pugh therein had set forth "objective information concerning identifiable conduct on the part of the defendant occurring

after the time of the original sentencing proceeding.", and that the writ of certiorari granted Mr. Moon therefore should be dismissed as improvident (*Moon* at 320, 321).

Second: In *Odom v. United States*, November 9, 1970 ..... US ....., 91 S Ct ....., 27 L ed 2d 122, the Supreme Court determined to employ sentencing Judge McRae's order of July 1, 1970, the order having made "it clear that the greater severity of the second sentence was based on conduct on the part of the petitioner occurring after the time of the original sentencing proceeding, and that the new information was specifically referred to at resentencing." (*Odom* at .....). Again, the writ was dismissed as improvidently granted.

My question is: Why is this professedly USSC-devoted Court of a State unwilling to accept sentencing Judge Byrns' even more convincing statement at sentence (*ante* at .....), and his equally convincing affidavit (which last the Court itself requested), as equally or more persuasive that something quite aside from "retaliatory motivation" led to Payne's somewhat more severe sentence of August 30, 1967?

Is it not true that here, as pointed out by the writer in his 1970 opinion (*ante* at .....), that there is not "the slightest suggestion or hint in the brief of Mr. Payne, that Judge Byrns was 'vindictive'."? Clear it is that Michigan trial court judges are in for "vindictive" discipline if they do not go easy on vicious professionals like Leroy Payne and Lionel Bradford. Both deliberately stopped to shoot at the officers, one of whom was grievously wounded, wholly helpless, and prone on the pavement. And all these facts could not possibly have been known to sentencing Judge Byrns until Bradford and Payne had been separately tried. (For appellate review of Bradford's conviction, see *People v. Bradford*, 10 Mich App 696; leave to appeal denied September 30, 1968; 381 Mich 778).

To conclude:

The projected issue of retroactivity of *Pearce* is no more present now, in this case of *Payne*, than it was in *Moon* and *Odom* when each was decided. Without thought

of attempted usurpation of the Supreme Court's exclusive prerogative, I suggest that we may accept provisionally the ultra-liberal hope that the quoted portion (ante at .....) of *Pearce* will some day be held retroactive, and yet properly find under *Moon* and *Odom* that Judge Byrn's sentencing statement and subsequent affidavit, like that of Judge Pugh in *Moon*, has left Mr. Payne's appeal both bootless and improvident. I conclude as the Supreme Court did in *Odom*:

> "Since it is now apparent that this case does not present the issue of the retroactivity of *North Carolina v. Pearce, supra*, the writ is dismissed as improvidently granted."

Believing that this Court has no honorable right to usurp the statutorily confided exclusive discretion of trial court judges in the sentencing of convicted felons, I adhere to the first premise of *Pearce's* immediate father (*Williams v. New York* [1949], 337 US 241, 245; 69 S Ct 1079; 93 L ed 1337), distilled as it was by *North Carolina v. Pearce* at 723:

> "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' "

As before, I vote to affirm.

(s) Eugene F. Black

APPENDIX

(Copy of Judge Pugh's affidavit, mentioned by the Supreme Court in Moon v. Maryland, June 8, 1970, 26 L ed 2d 262, 264)

RESPONDENT'S EXHIBIT "A"

In The Circuit Court for Montgomery County, Md.

Nos. 7639 and 7640

State of Maryland

vs.

Dennis Mullene Moon

At the request of the Attorney General of Maryland, made to me on the 30th day of September, 1969, I do hereby make the following statement:

On June 6th and 7th, 1966, I presided over the jury trial of Dennis Mullene Moon who was convicted under two indictments, (No. 7639 and No. 7640) with the crimes of assault with intent to kill and murder (No. 7639 Criminals) and robbery with a deadly weapon and grand larceny (No. 7640 Criminals). At the request of the defendant's attorney, sentence was imposed after the return of the verdict, no request for a presentence investigation was made because such was not desired by defendant's attorney. At the sentencing I was informed that another Judge of this Court had sentenced the defendant to twelve years in the penal institution after his conviction of the crime of robbery with a deadly weapon. There was no trial under Criminals No. 7639 charging assault with intent to kill and murder, at the first trial. I was also aware of the fact that the defendant was given a retrial as a result of the decision of the Maryland Court of Appeals in the case of Schowgurow vs. State, 240 Md. 121. I sentenced the defend-

ant for his conviction of robbery with a deadly weapon, under Count One of the Indictment in Criminals No. 7640 to a period of twenty years, and for a period of ten years under Count Number Six of this indictment the ten year sentence to be suspended on condition that when the defendant is released from his sentence under the First Count that he will remain on good behavior and not get in any trouble any more. I sentenced the defendant to ten years under Count No. One in Criminals No. 7639, charging assault with intent to kill and murder, this latter sentence to be suspended on condition that he remain on good behavior when he is released from his sentence under the First Count in Criminal No. 7640. Credit was also given for the time previously served by the defendant awaiting retrial from June 2, 1964, to June 7, 1966, (2 years and 5 days). At the time of sentencing, I took into consideration the following facts:

1. The defendant bludgeoned the victim with a pipe rendering her unconscious for a long period of time, causing her to be hospitalized for four days. She had a complete loss of memory of the events of the crime. The attending physician testified that she had head and eye injuries, that she was rather confused, disoriented, suffering from headaches, that she had deep lacerations over her left eyebrow with marked hemorrhage around the eye, contusions behind the right ear, abrasions of the left knee, a concussion, cerebral concussion, that she was under a doctor's care until July 6, 1964, a period of forty-nine days that she was still suffering from the affects of her injuries on the date of trial when she broke down in tears on the witness stand.

2. The defendant stole the sum of $400.00 from the victim, whom he knew, by means of his attempt to kill her, to prevent his identification by her.

3. The defendant was tried and convicted of another offense at his trial, the crime of assault with intent to kill and murder, which sentence of ten years I suspended on condition that he remain on good behavior when he is released under the sentence of twenty years.

4. The defendant had previous convictions of housebreaking and larceny for which he was sentenced to one

year in Ft. Leavenworth, Kansas, in 1959, a conviction under the Dyer Act in Carson City, Nevada, in 1961 for which he was sentenced to three years; a conviction on April 13, 1961 under Title 18, Sec. 2312 in Las Vagas, Nevada, for which he was given three (3) years.

5. The defendant took the stand and under oath denied that he had struck the defendant. When his lawyer called to the defendant's attention that he took the stand in the previous trial and admitted hitting the victim, the defendant said he did not remember testifying that he hit the victim at the first trial, which I did not believe, and I was convinced that he had perjured himself at this sentencing which I considered as identifiable misconduct on his part occurring after the time of the original sentence.

6. That on June 8, 1966, I refused to sign an order to have the defendant transferred from the Maryland Penitentiary to the Patuxent Institution for his evaluation as to whether or not he was a defective delinquent under Article 31B, Section 5 of the Code of Laws of Maryland stating that "The defendant has been sentenced to twenty years in the Penitentiary plus two ten year sentences which were suspended and the Court is of the opinion that the sentence of twenty years plus the two ten year suspended sentences is adequate and therefore no proceedings should be filed under the defective delinquency statute."

7. I had not read the transcript of the first trial and did not preside at the first trial, therefore did not know what facts and circumstances the first Trial Judge took into consideration in sentencing the defendant to twelve years.

Respectfully submitted,

James H. Pugh,
Judge of the Circuit Court for
Montgomery County, Maryland

Subscribed and sworn to before me this 1st day of October, A.D., 1969.

Betty Ruth Belcher,
Notary Public, Maryland

(Seal)

35/April 1971
[No. 52618½]

BEFORE THE ENTIRE BENCH

ADAMS, J.

ON REHEARING

I concur with that portion of Justice Black's opinion which he designates as his 1970 opinion.

(s) Paul L. Adams

35/April 1971

BEFORE THE ENTIRE BENCH

WILLIAMS, J. (concurring)

I concur with the Chief Justice's analysis of *Pearce* and the fact it is controlling. Personally, however, I think Justice White's opinion makes better sense.

(s) G. Mennen Williams

APPENDIX B — OPINION OF THE COURT OF APPEALS

(Filed June 25, 1969)

BEFORE: Quinn, P.J., T. M. Burns and Holbrook, J.J.

QUINN, P.J.

December 14, 1962, defendant, represented by counsel, pleaded guilty to a charge of assault with intent to commit murder, CL 1948, § 750.83 (Stat Ann 1962 Rev § 28.278). Thereafter, defendant was sentenced to prison for a term of 19 to 40 years. Judge Hadsell presided at the plea and sentence. Judge Hadsell's term of office expired January 1, 1967 and he was replaced by Judge Byrns. 378 Mich (v).

Following a remand from the Court of Appeals for that purpose, a hearing was held June 15, 1967 to determine the voluntariness of confessions, admissions and statements against interest made by defendant prior to his plea. As a result of the hearing, the trial court suppressed all confessions, admissions and statements against interest, set aside the plea, vacated sentence and remanded the case for preliminary examination.

At the conclusion of the examination, defendant was bound over for trial. His motion for change of venue was granted, and he was tried before Judge Byrns and a jury in Kent county. August 24, 1967, the jury returned a verdict of guilty as charged. Thereafter defendant was sentenced to prison for a term of 25 to 50 years, with credit for time already served. His appeal raises 5 issues, 4 of which do not merit discussion.

Defendant contends it was reversible error for Judge Byrns to impose a more severe sentence than did Judge Hadsell. In *People v. Poole* (1967), 7 Mich App 237, this Court held such action was not error. In *People v. Mulier* (1968), 12 Mich App 28, this Court held such action was reversible error. The cases are not in conflict, however; factual differences permit each pronouncement to stand without encroachment on the other. In *Poole*, a different judge imposed the harsher sentence and reason for such action appeared in the record. In *Mulier*, the same judge imposed the harsher sentence for no reason apparent on the record. The distinction is noted in *Mulier* at page 33:

> "To allow the imposition of a harsher sentence after a rehearing, where the offense, the plea, and the sentencing judge are the same as in the prior proceeding and the record is barren of any grounds tending to support the harsher sentence, unduly infringes upon the constitutional right of appeal."

This case of Payne is stronger than *Poole, supra*. In *Poole*, both convictions were by plea. In Payne, the first conviction was by plea and the second was by jury verdict. A trial affords more opportunity to hear all details, to observe and judge a defendant than does a summary plea

proceeding, a fact noted by Judge Byrns. The trial judge noted the right of every citizen to seek appellate relief and the fact that obtaining such relief should in no way affect a subsequent sentence. The trial judge then stated that the sentence he was about to impose was not because defendant had appealed but by reason of the nature of the crime and impressions formed of defendant during 3 days of trial. The trial judge noted that the statute under which defendant was convicted authorized a life sentence or any term of years, and except for defendant's past history (poor family background, good school, service and prison records), a life sentence would have been imposed.

On this record, we conclude that we do not have supervisory control over punishment within the provisions of the statute, *Poole, supra* and that *Mulier, supra,* is inapplicable.

Affirmed.

ORDER AFFIRMING JUDGMENT OF BERRIEN COUNTY CIRCUIT COURT
(Filed July 28, 1969)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the 25th day of June in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable

Timothy C. Quinn
Presiding Judge

Donald E. Holbrook
Thomas M. Burns
Judges

This cause having been brought to this Court by appeal from Berrien County Circuit Court, and having been ar-

gued by counsel, and due deliberation had thereon, it is now ordered by the Court, that the judgment of the Berrien County Circuit Court be and the same is hereby affirmed.

Judge Thomas M. Burns, dissents.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 17th day of July in the year of our Lord one thousand nine hundred and sixty-nine.

(s) Ronald L. Dzierbicki
Clerk

DISSENTING OPINION

BEFORE: Quinn, P.J., T. M. Burns and Holbrook, J.J.

T. M. Burns, Dissenting

I concur with my brothers' disposition of all issues raised in this appeal save the question of whether the imposition of a more severe sentence upon retrial after the defendant gained reversal of his prior conviction on constitutional grounds is permissible. Upon this question of more severe sentence on retrial, I must respectfully dissent.

The majority here relies on an extremely tenuous distinction between the cases of *People v. Poole,* (1967), 7 Mich App 237, and *People v. Mulier* (1968), 12 Mich App

28, based on the fact that here in *Poole, supra,* the judge on retrial was different than the judge in the original trial while in *Mulier, supra,* the same judge presided over both trials. Although this seeming distinction has been noted recently in *People v. Parm* (1968), 15 Mich App 303, it is a distinction without real meaning or substance.

Further in *Poole, supra* the question of infringing upon the constitutional right of appeal was not present. In *Poole* the defendant *pled guilty* then made a motion for new trial on the ground that he had not been informed of his right to counsel at the arraignment. Even though the defendant had been represented by counsel at the arraignment, the trial judge granted motion for new trial and the defendant pled guilty again. The question of imposing a harsher sentence for exercising the right of appeal as granted by the Constitution of this state was not raised. Const. 1963 art 1, § 20.

The majority mentions justification in the record for increasing the sentence upon retrial present in *Poole* and here which was not present in *Mulier* and I suppose in *Parm, supra.* After a careful review of the record in this case I fail to find anything that might legitimately be taken into consideration in sentencing which was not known to the judge at the first sentencing hearing in March of 1963. The self-serving declaration of the sentencing judge that he was not imposing a harsher sentence because defendant appealed and that he was giving the defendant credit for time served does not change the practical realities of the situation.

The effect of raising the sentence from 19 to 40, to 25 to 50 with credit for time served when the defendant has already served almost 5 years is, at least, to deny him credit for time served which is impermissible under *Moore v. Parole Board* (1967), 379 Mich 624, which reversed 4 Mich App 261. CLS 1961, § 769.11a (Stat Ann 1965 Cum Supp § 28.1083(1)).

The increased sentence which was imposed upon the defendant here is clearly impermissible under the recent United States Supreme Court case of *North Carolina v. Pearce* (No. 413), *Simpson v. Rice* (No. 418) (1969) 37 LW 460, even though the opinion of the court in that case

which was signed by only three justices would permit a harsher sentence under certain conditions.

Justice Stewart speaking for himself, Justice Brennan and Chief Justice Warren said at p 4605:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. *Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal". (Emphasis added).

There is no such, ". . . objective information concerning identifiable conduct on the part of the defendant after the time of the original sentence (,)" in the record on appeal. Lacking this affirmative showing, a more severe sentence cannot be allowed on retrial. *North Carolina v. Pearce* (No. 413), *Simpson v. Rice* (No. 418), supra, p 4605.

Yet, I would join Justices Douglas and Marshall, and Justice Harlan, who in separate opinions go beyond the holding of the Court, and say that since the Court has made the double jeopardy clause of the Fifth amendment applicable to the states in *Benton v. Maryland* (No. 201) (1969) 37 LW 4623, a harsher sentence may not be imposed

upon retrial after a successful appeal. *North Carolina v. Pearce* (No. 413), *Simpson v. Rice* (No. 418), *supra.*•

The majority here, as in *North Carolina v. Pearce, supra,* express the view as stated in *Poole, supra,* at 242 said:

> "Defendant knowingly took a risk in seeking a new trial and should not be heard to complain because a new minimum sentence may increase the time he might serve."

The effect of the majority's opinion here is to say to a defendant whose constitutional rights have been violated at trial that you may vindicate your rights, but if the appeals court reverses the conviction, you may be given a higher sentence which will cover the time you were illegally in prison even though you are "given credit for time served". The majority opinion in this respect, is declaring their adherence to the "total waiver" theory of double jeopardy expressed in *Stroud v. United States* (1919), 251 US 15, 18 (40 S Ct 50, 64 L ed 130), which has been substantially undercut, if not totally placed in disrepute, by *Green v. United States* (1962), 355 US 184 (78 S Ct 221, 2 L ed 199). *North Carolina v. Pearce, supra,* (concurring Justices Douglas and Marshall, also Justice Harlan concurring and dissenting).

In *Green v. United States* (1962), 355 US 184 (78 S Ct 221, 2 L ed 199), the Court enunciated the "limited waiver" doctrine for interpreting the double jeopardy provisions of the Fifth Amendment. Under this doctrine a defendant only waived the bar against double jeopardy by appealing his conviction to the extent necessary for his purposes. The effect of this doctrine is to forbid the retrial of defendant for a defendant for a greater offense than he was originally convicted of as an unconscionable premium upon a successful appeal.

•This court held in *People v. Bower* (1966) 3 Mich App 585, 589 that the 5th Amendment double jeopardy clause was applicable through the 14th Amendment.

Justice Douglas speaking of the effect of *Green* on the practice of allowing a harsher sentence on retrial after an appeal says:

> "The theory of double jeopardy is that a person need run the gauntlet only once. The gauntlet is the risk of the range of punishment which the State or Federal Government imposes for that particular conduct. It may be a year to 25 years, or 20 years to life, or death. He risks the maximum permissible punishment when first tried. That risk having been faced once need not be faced again. And the fact that he takes an appeal does not waive his constitutional defense of former jeopardy to a second prosecution. *Green v. United States,* 355 U.S. 184, 191-193.

In the *Green* case, the defendant was charged with arson on one count and on a second count was charged either with first degree murder carrying a mandatory death sentence, or second degree murder carrying a maximum sentence of life imprisonment. The jury found him guilty of arson and second degree murder but the verdict was silent as to first degree murder. He appealed the conviction and obtained a reversal. On a remand he was tried again. This time he was convicted of first degree murder and sentenced to death — hence his complaint of former jeopardy. We held that the guarantee of double jeopardy applied and that the defendant, having been "in direct peril of being convicted and punished for first degree murder at his first trial" could not be "forced to run the gauntlet" twice. 355 U.S. at p. 180.

It is argued that the case is different because there were two different crimes with different punishments provided by statute for each one. That, however, is a matter of semantics. "It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments, or allows the court or jury to fix different punishments for the same crime." *California v. Hender-*

son, 60 Cal. 2d 482, 497, 35 Cal. Rptr. 77 (1963) (Traynor, J.).

From the point of view of the individual and his liberty, the risk here of getting from one to 15 years for specified conduct is different only in degree from the risk in *Green* of getting a life imprisonment or capital punishment for specified conduct. *North Carolina v. Pearce, supra*, at p. 4606.

Justice Harlan in a very scholarly opinion supports Justice Douglas' reliance on *Green*. Justice Harlan says — pp 4611-4613:

"Given *Benton*, it is my view that the decision of this Court in *Green v. United States*, 355 U. S. 184 (1958), from which I dissented at the time, points strongly to the conclusion, also reached by my Brother Douglas, ante, at ....., that the Double Jeopardy Clause of the Fifth Amendment governs both issues presently decided by the Court. Accordingly, I join in Part I of the Court's opinion, and concur in the result reached in Part II, except in one minor respect.

Green v. United States, supra, held in effect that a defendant who is convicted of a lesser offense included in that charged in the original indictment, and who thereafter secures reversal, may be retried only for the lesser included offense. Mr. Justice Frankfurter observed, in a dissent which I joined, that:

"As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly [increased] . . . punishment . . . ." Id., at 213.

Further reflection a decade later has not changed my view that the two situations cannot be meaningfully distinguished.

"Every consideration enunciated by the Court in support of the decision in *Green* applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. See *id.*, at 190. And the concept or fiction of an 'implied acquittal' of the greater offense, ibid., applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of 'badness' or gravity only, and therefore merited only a certain limited punishment. Most significantly, perhaps, in each case a contrary rule would place the defendant considering whether to appeal his conviction in the same 'incredible dilemma' and confront him with the same 'desperate choice.' Id., at 193. His decision whether or not to appeal would be burdened by the consideration that success, followed by retrial and conviction, might place him in a far worse position than if he remained silent and suffered what seemed to him an unjust punishment. In terms of *Green*, that the imposition of a more severe sentence on retrial is a matter of pure *chance*, rather than the result of purposeful retaliation for having taken an appeal, renders the choice no less 'desperate.'

"If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree of offense or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause? It cannot be that the provision does not comprehend 'sentences' — as distinguished from 'offenses' — for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one. See *United States v. Benz*, 282 U.S. 304, 306-307 (1931); *Ex parte Lange*, 18 Wall. 163, 168, 173 (1873).

"The Court does not suggest otherwise, but in its view, apparently, when the conviction itself and not merely the consequent sentence has been set aside, or when either has been set aside at the defendant's behest, the 'slate has been wiped clean,' *ante*, at 9, and the Double Jeopardy Clause presents no bar to the imposition of a sentence greater than that originally imposed. In support of this proposition, the Court relies chiefly on two cases, *Stroud v. United States*, 251 U.S. 15 (1919), and *United States v. Ball*, 163 U.S. 662 (1896). I do not believe that either of these cases provides an adequate basis for the Court's seemingly incongruous conclusion.

"*Stroud v. United States, supra*, held that a defendant who received a life sentence for first degree murder could, upon securing a reversal of the conviction, be retried for first degree murder and sentenced to death. However, the opinion does not explicitly advert to the question whether the Double Jeopardy Clause bars the imposition of an increased punishment, and an examination of the briefs in that case confirms the doubt expressed by the Court of Appeals in *Patton v. North Carolina*, 381 F. 2d 636, 644 (1967), whether this question was squarely presented to the Court. Assuming that *Stroud* stood for the proposition which the majority attributes to it, that decision simply cannot be squared with the subsequent decision in *Green v. United States*, 355 U.S. 184 (1958), See, *id.*, at 213; *People v. Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963).

"The Court does not rest solely on this ambiguous and doubtful precedent, however. Its main point seems to be that to limit the punishment on retrial to that imposed at the former trial 'would be to cast doubt upon the whole validity of the basic principle enunciated in *United States v. Ball*,' 163 U.S. 662 (1896), and its progeny. *Ante*, at 9-10.

"*Ball* held, simply, that a defendant who succeeds in getting his first conviction set aside may there-

after be retried for the same offense of which he was formerly convicted. This is indeed, a fundamental doctrine in our criminal jurisprudence, and I would be the last to undermine it. But *Ball* does not speak to the question of what *punishment* may be imposed on retrial. I entirely fail to understand the Court's suggestion, unless it assumes that *Ball* must stand or fall on the question-begging notion that, to quote the majority today, 'the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean', *Ante*, at 9.

"In relying on this conceptual fiction, the majority forgets that *Green v. United States, supra,* prohibits the imposition of an increased punishment on retrial precisely because convictions are usually set aside only at the defendant's behest, and not in spite of that fact. 355 U.S., at 193-194; *supra*, at 3: the defendant's choice to appeal an erroneous conviction is protected by the rule that he may not again be placed in jeopardy of suffering the greater punishment not imposed at the first trial. Moreover, in its exaltation of form over substance and policy, the Court misconceives, I think, the essential principle of *Ball* itself:

" 'While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.' *United States v. Tateo*, 377 U.S. 436, 466 (1964).

"To be sure, this societal interest is compromised to a degree if the second judge is forbidden to impose a greater punishment on retrial than was meted out at the first trial. For example, new facts may develop between the first and second trial which would, as an initial matter, be considered in aggravation of sentence. By the same token, however, the prosecutor who was able to prove only second degree murder at the former trial might improve his case in the interim and acquire sufficient evidence to prove murder in the first degree. In either instance, if one views the second trial in a vacuum, the defendant has received less punishment than is his due. But in both cases, the compromise is designed to protect other societal interests, and it is, after *Green*, a compromise compelled by the Double Jeopardy Clause.

"I therefore conclude that, consistent with the Fifth Amendment, a defendant, who has once been convicted and sentenced to a particular punishment may not on retrial be placed again in jeopardy of receiving a greater punishment than was first imposed. Because the Double Jeopardy Clause has now been held applicable to the States, *Benton v. Maryland, supra*, I would affirm the judgment of the Court of Appeals in No. 418, and vacate and remand in No. 413, so that respondent Pearce may finish serving his first, valid sentence."

It is not necessary to premise this case, however, upon the double jeopardy provision of the Fifth Amendment for that is at best only a minimum protection or bar. This Court said in *People v. Mulier, supra*, p 33, that a more cogent ground for decision would be on the basis of protecting the right of appeal which is granted by the Michigan Constitution, Chief Judge Lesinski, speaking for the Court in *People v. Mulier, supra*, said at 32-33:

"An enlightened concept of the protections which the law affords the accused at each step of the judicial process has caused the Courts to re-examine the inherent fairness of the distinctions previously drawn to justify the imposition of harsher sentences under almost any set of circumstances."

I believe that the imposition of a greater sentence or the same sentence without credit for time served, upon retrial of a defendant who has vindicated his constitutional rights by exercising his right of appeal, unduly chills the right of appeal.

In *People v. Henderson, supra,* p. 492 the Court went on to hold that California's constitutional provision against double jeopardy prevented the imposition of the death penalty upon defendant after reversal of a judgment sentencing him to life imprisonment.

> "A defendant's right to an appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal."

See *People v. Ali* (1967), 57 Cal Rptr 348 (424 P 2d 932), where the same court applied the *Henderson* rationale to a situation where defendant has been sentenced to concurrent terms at the original trial and to consecutive terms after a successful appeal and subsequent reconviction for the same offense.

In *State v. Wolf* (1966), 46 NJ 301 (216 A 2d 586), 12 ALR 3d 970, where the Supreme Court of New Jersey held that the prosecution was barred from seeking the death penalty at the new trial; the defendant received a life sentence upon his conviction for murder in the first degree and the death sentence on retrial after an appeal. The Court reasoned that since the state granted a convicted murderer the unqualified right of appeal, standards of procedural fairness forbid limiting the right by requiring the defendant to barter with his life for the privilege of exercising it.

In *State v. Turner* (1967), 247 or 301 (429 P 2d 565, 570, 571), the Supreme Court of Oregon, following the lead taken in *State v. Wolf, supra,* and *People v. Henderson, supra,* promulgated the following procedural rule to be applied in all cases to assure the criminal defendant the unfettered exercise of his statutory right of appeal:

> "After an appeal of post-conviction proceeding has resulted in the ordering of a retrial for errors other than an erroneous sentence, * * * and the defendant has again been convicted, no harsher sentence can be given than that originally imposed. If the initial sentence was incarceration, the defendant subsequently cannot be sentenced to any longer term than the time still to be served upon his initial sentence."

This is the rule which I would have this Court adopt in this case. The majority here would force a defendant whose constitutional rights had been violated in a way which resulted in an invalid conviction to suffer this violation for the fear that on retrial he would be given an even greater penalty. I do not believe that such a price can be exacted for invocation of a right. I would reverse and remand for resentencing with the sentence imposed at the first trial as a maximum and with credit for time served.

APPENDIX C — ARRAIGNMENT TRANSCRIPT

(Filed January 3, 1963)

(1)

People of the State of Michigan

vs.

LeRoy Payne, Respondent

Case No. X-751 Dated December 14, 1962
Action: Arraignment

Appearances:

Hon. Philip A. Hadsell, Circuit Judge
Atty. Frederick Lake, Assistant Pros. Atty.
Atty. Philip A. Brown, Atty. for Respondent

MR. LAKE: May it please the court, this is the matter of the People of the State of Michigan versus LeRoy Payne, here on an information charging the crime of assault with intent to commit murder. This is the Court's Docket X-751.

Mr. Payne is represented in court by his attorney, Mr. Brown, of St. Joseph, and the record will show that a preliminary examination was had on this charge, and in the Municipal Court for the City of Benton Harbor, and that the respondent was bound over to this court to answer to this information.

(2)

Mr. Brown, will you waive further reading of this information at this time?

MR. BROWN: Respondent waives further reading of the information at this time, your Honor.

I have gone over the elements of this offense with the respondent quite extensively. I have explained to him his various rights; his right to a jury trial; his right to plead guilty to the offense; his right to plead not guilty. I have also explained to him the maximum penalty, upon a conviction, of this crime.

We have had a preliminary examination on this charge, and the People have shown probable cause here, and he was bound over.

I have also explained to him that regardless of any promises of any kind, of leniency, as to entering a plea of guilty, this was in no one's control but the court, and that the maximum penalty was life, or any term of years, for a conviction under this charge, and I have explained, as I said, the various rights to the respondent, under the constitution and the statutes, and the respondent has advised me that he wishes to tender a plea of guilty to this offense at this time.

THE COURT: Mr. Payne, you have heard what your counsel has said? Is that a correct statement (3) of the facts?

THE RESPONDENT: Yes, sir.

THE COURT: In this case, due to the publicity that I have read, which may or may not be true, I want to be very careful that you understand exactly what you are

doing, and that you are not doing it because of any reason other than that you are guilty.

I take it from the examination and from your counsel that the People can prove you guilty of this charge beyond a reasonable doubt, without any use of an alleged confession that was included in the case, as I understand it. Is that correct?

THE RESPONDENT: Yes.

THE COURT: In other words, I am informed that there was a positive identification by the victim, by Victor Yost, or another officer that was with him, of your identification. Do you understand that to be the fact?

THE RESPONDENT: Yes, sir.

THE COURT: And is that the fact?

THE RESPONDENT: Yes, sir.

THE COURT: I also have been informed that you signed a confession to this crime, but that before you signed it you received some physical harm at the hands (4) of somebody, but that you have stated that you do not wish that to be considered in this matter, is that correct?

THE RESPONDENT: Yes, I'm pleading guilty because I am guilty, and I'm sorry about it.

THE COURT: That comes up later. If the court is satisfied to accept your plea of guilty, then that part about your reformation, if any, comes at a later date, and is taken into consideration by the court in passing sentence, or possibly taken into consideration. There is nothing that you can be sure of, if your plea is accepted, except that you'll be sentenced in some manner by the court for this crime, to which you are pleading guilty.

I don't know as you have stated on the record that you do plead guilty. Is that true?

THE RESPONDENT: I do plead guilty, sir.

THE COURT: Did you, on the 5th day of November, 1962, at the City of Benton Harbor, in Berrien County, Michigan, feloniously assault Victor Yost with a gun, as I understand it — although it isn't so alleged — and that you then and there intended to kill and murder?

THE RESPONDENT: Yes.

THE COURT: Nobody has promised you leniency or

threatened you, to get you to plead guilty? (5) And you are pleading guilty because you did do that?

THE RESPONDENT: I have been threatened, sir, but it's not because of these threats that I'm pleading guilty.

THE COURT: You had threats, but you are not pleading guilty because you were threatened, is that correct?

THE RESPONDENT: Yes.

THE COURT: And nobody has promised you that you'll get a shorter sentence because you are pleading guilty, than if you pleaded not guilty? Is that correct? Nobody has promised you that you'll get a shorter sentence?

THE RESPONDENT: Well, sir, I mean I have talked to so many policemen and all. They said that it would be likely that if I did cooperate that —.

THE COURT: Now, if anybody has told you, or if you are of the opinion that you may get a shorter sentence if you plead guilty than you'd get if you pleaded not guilty, that's wrong. That will have no bearing on the sentence of the court. At least it won't if I do it, and I think I'll probably be the one that does it.

Do you understand me now?

(6)

THE RESPONDENT: Yes, sir.

THE COURT: It doesn't make any difference to me whether you plead not guilty or guilty. In fact I can't accept a plea of guilty until I'm convinced that you are guilty, and you are the only one that can convince me now, because we can't try the case here today. We simply are trying to find out what you want to do, and your counsel has stated — and I'm sure he wouldn't state it if it wasn't true — that he has told you that you have a right to a trial, a jury trial, and he told you all these rights, and you understand that?

THE RESPONDENT: Yes.

THE COURT: You don't want a jury trial, and you want to plead guilty, is that correct?

THE RESPONDENT: Yes.

THE COURT: You want to plead guilty because you are guilty?

THE RESPONDENT: Yes.

THE COURT: Very well. The court feels the plea of guilty is freely, voluntarily and understandingly made, without undue influence, compulsion or duress, and without promise of leniency, and it is therefore accepted.

You are remanded to the custody of the sheriff to (7) await sentence.

The probation officer of this court will convey to the court anything that you wish the court to know, before sentence is pronounced. It will take several days, maybe weeks, to complete the case in the probation department, so that I may have the proper information before sentence is pronounced.

That's all.

APPENDIX D — SENTENCE TRANSCRIPT

(Filed March 19, 1963)

(1)

People of the State of Michigan vs. LeRoy Payne, Case No. X-751, Dated March 8, 1963. Action: Sentence.

Appearances:

Hon. Philip A. Hadsell, Circuit Judge
Atty. Philip A. Brown, Atty. for Respondent

THE COURT: Mr. Payne, you are before the court for sentence, having pleaded guilty to assault with intent to murder.

I have talked with your counsel. I have a very comprehensive report from the probation department relative to your case. I heard your testimony in the case of the People versus Lionel Bradford. I have, I think, all the facts that I need, in mind.

Do you have anything to say, or does your counsel have anything further to say? I have already talked with him, of course.

(2)

THE RESPONDENT: I'd like to say, your Honor, that I am sorry. I know that I was wrong.

THE COURT: I understood that that was your position.

MR. BROWN: I have nothing further to convey to the court, your Honor, having already talked to you.

THE COURT: Very well.

Starting with your honorable discharge from the U.S. Army in 1960 — from then on, according to your own admissions, you have been the type of citizen, or were the type of citizen, until the time you committed this crime, that would, to my mind, require elimination from society from now on.

If there is any distinction at all between superlatives, the assault of an individual with intent to murder is very bad; assault with intent to murder a policeman is worse, if, as I say, if there is any distinction between superlatives, because that's not only an attack upon the individual, it's an attack upon society; an attack upon a representative of society as a whole.

As I say, from that side of the picture it would require, in my opinion, your complete elimination from (3) society.

Now, on the other side of the question, you have voluntarily admitted — if I remember the number correctly — eighteen breakings and enterings prior to this time, or maybe including the one that you had committed just before you committed this crime.

According to your testimony, several representatives of society were guilty of unpardonable actions in connection with their treatment of you. Now, at least some of those could possibly be explained, if not excused, by the fact, that you had shot a deputy sheriff with intent to kill him. However, you have been importuned quite strongly, as I understand it, by representatives of your race, and your own mother, that they should be prosecuted for their actions in that connection, and you have stated, according to my information, that you made a mistake, and you are asking forgiveness for that, and that they made a mistake, and that you are willing to forgive them their mistake.

I am also reliably informed, and have come to the conclusion myself, that the normal reaction we get from prisoners who are awaiting sentence, that they are going to get religion. In your case I feel it's an honest one, which quite frequently it's not. At least I have (4) become convinced of that.

The sentence that I am about to impose on you will give you hope of returning to society after a — what I consider a reasonable length of time, providing that you are honestly desirous of reformation and have a change of these past actions that you have been guilty of since you got out of the army, and that you are intelligent enough to become a useful member of society after you have paid your debt to it.

I am also informed — maybe not reliably — that the two gentlemen against whom you gave testimony, namely Charles Hawkins and Lionel Bradford, have made threats upon your life, or if not that, upon causing you physical injury, so I recommend to the prison authorities that you be not incarcerated in the same place that they are, or at least not where you will come in contact with them, or they with you.

If I'm correctly informed, and I'm quite sure I am, the sentence I am about to impose on you will permit you to be subject to parole approximately ten years from this date, which will give you an opportunity, if you take advantage of the time that the statute gives you, and the extra good time that you can acquire in the penitentiary, of returning to society, assuming that you do (5) convince them, also, that you are that type of individual that should be turned loose in society.

It is the judgment of this court that you be committed to the Michigan Corrections Commission at the State Prison of Southern Michigan, Township of Blackman, County of Jackson, under the provisions of the Michigan Code of Criminal Procedure, and the Michigan Penal Code, and the amendments thereto.

I fix the minimum term of such imprisonment at nineteen (19) years from and after this date. I fix the maximum of such term at forty years (40) from and after this date.

You are remanded to the custody of the sheriff for transmittal to Jackson.

APPENDIX E — TRANSCRIPT OF SENTENCE

(Filed September 8, 1967)

(1)

People of the State of Michigan vs. LeRoy Payne. Case No. X-751. Date 30 August 1967. Action: Sentence.

Appearances:

Hon. Chester J. Byrns, Circuit Judge
Atty. Philip Brown, Atty. for Respondent

THE COURT: This is the matter of the People of the State of Michigan versus LeRoy Payne here on a conviction of guilty to the crime of assault with intent to commit murder, which verdict was rendered in Kent County, on the request of the Defendant for a Change of Venue to get a jury that might have and did have no connection whatsoever with any local media of communications. With Mr. Payne is his attorney, Mr. Philip Brown, of St. Joseph, Michigan. Mr. Brown, is there any reason why sentence cannot be pronounced at this time?

MR. BROWN: I know of no reason, Your Honor. I previously conferred with the Court regarding sentence.

(2)

THE COURT: Mr. Payne, is there any reason why I should not pronounce sentence now?

THE RESPONDENT: No, sir.

THE COURT: Mr. Brown, you have spent some time with me arguing very eloquently and ably on behalf of your client towards mitigation of sentence. Is there anything further that you wish to say?

I would like to note that I have discussed this with the officer making the pre-sentence investigation as well. Is there anything further that I should consider before pronouncing sentence — any circumstances you wish me to consider?

THE RESPONDENT: I have nothing to say, Your Honor.

THE COURT: Mr. Payne, you are living proof of the tremendous rights given under our law to protect the innocent even though at times, such rights may shield the guilty. You have enjoyed rights and you will enjoy them hereafter, which the average man who would have to pay his own way could not afford.

First, you have been furnished counsel, Mr. (3) Philip Brown of St. Joseph, who has done an outstanding job on your behalf and you have good reason to know, not only from his relentless efforts in getting an appeal to win you a new trial, but, as I think the record of trial itself will show, he did an excellent job in your defense in the three days that we were in Grand Rapids.

Second: On an appeal brought by you, the Michigan Court of Appeals sent this case back to Berrien County to hear your complaint about the police handling of you following the arrest which caused your confession and plea of guilty to be non voluntary.

Third: Because there was some question as a result of the handling of you by a few officers following your arrest, which we trust will never happen again in this County, they gave you every benefit of the doubt. Your guilty plea was set aside and your confession was suppressed. You were granted a new trial at which any mention of confession of guilty plea was prohibited by this Court. Since there was within this County various news and radio media who had published facts of your (4) guilty plea and of your confession, there was a possibility that an absolutely impartial jury might not be found and a motion for a change of venue was granted for trial only, and the trial at considerable expense to the County was transferred to Kent County and there convened for three days with myself as presiding judge.

Fifth: At this three day trial, the jury was prohibited from reading or hearing any news that might possibly concern the trial. As a matter of fact, we prohibited them from reading the newspapers and we prohibited them from listening to their radios or television sets. In addition, at that trial, you got all of the benefits of law, instructions to the jury, including those instructions given on presumption of innocence on your part and the duty of the prosecution to prove your guilt beyond a reasonable doubt by all twelve of the jurors. And finally, today, after your conviction — and I will give you your sentence in a minute or two — you will still have a right to appeal at public expense if you so desire.

Mr. Payne, in presiding over your three day trial (5) I want to tell you that without any reservation, I agreed with the jury's verdict of guilty. I heard your own testimony and I heard your cross-examination, and of course I had an ample opportunity of hearing about your crime which was one of extreme violence. It was senseless; it was cruel, and frankly, I think it reflected a depravity of heart and but not for the grace of God, and the good physical condition of Victor Yost, he survived. He was shot not once, not twice, but three times. Mr. Yost has suffered and is still suffering from the near fatal wounds that you inflicted. You were there when the doctor's testimony reflected that it took some three to four hours spent in surgery trying to save this man's life. Mr. Yost is a brave and able officer and is to be complimented for the excellent and fair manner in which he testified at your trial. And a police officer, whether he may be popular with someone or not is nevertheless a symbol of authority and whoever shoots a police officer in line of duty assaults not only the officer; not only the man, but he assaults all of society because law and order cannot (6) exist unless our officers have the respect and the protection to which they are entitled to. These are precious rights of citizenship which you and I recognize and which would not exist if it were not for officers like Victor Yost who are willing not only to work, but even to die to preserve these rights.

Assault with intent to murder, especially when a gun is used, is a most serious crime when the victim is a police

officer in line of duty. I have felt since I have been judge that crime of violence are the worst, and I have felt that the use of weapons shows a willfullness and a hatred of which we have too much of in our society today.

When you appeal, and win a new trial, you wipe clean the previous conviction and sentence. You have then a presumption of innocence which I think the record will bear out and of which I maintain I protected throughout your trial and which your attorney was most zealous in insuring. This Court is no longer bound by the earlier sentence. I cite an Authority, Mr. Reporter, People versus Poole, P-O-O-L-E, 7 Michigan, Appellate 291.

(7)

THE COURT: In your trial, you might have been acquitted and set free and you also risked a larger sentence with a different judge and this is a different judge between your sentence of five and one-half years ago and today; a judge who had a more detailed account of what you did during this new trial than the judge who sentenced you on a plea of guilty and did not have the same opportunity to form impressions nor did my distinguished colleague hear all of the details as it came out in this particular trial.

I am not setting a larger sentence than what I will set in a few minutes because you appealed or because of any added work or expense of a new trial. This I assure you, and every American citizen has an absolute right to an appeal and to redress. As citizens, they are entitled to use the protection and rights that the law gives them and I would like to think that no judge will be more careful than I to insure this which we reward no man because he pleads guilty and we punish no man because he pleads innocent. The larger sentence which I impose here is based on the nature of the crime and on the impressions which I (8) formed of you and of the crime for the three days of the trial and what I honestly believe your crime showed of your character and attitude. Now, I had considered a mandatory life sentence because the maximum term of imprisonment here could be any term of years up

to life imprisonment. The only reason that I am not doing this is that I am looking into your past history and I have given this searching thought right up to the very last moment. You have a very poor family background for which you are not to blame, Mr. Payne. Your school reports were good and you served approximately three years in the Army and you earned an honorable discharge while in service although I believe there was a court-martial — wasn't there, Mr. Payne?

THE RESPONDENT: It was just a minor matter. It wasn't what you would call a court-martial —

THE COURT: Administrative — company punishment?

THE RESPONDENT: Yes, sir.

THE COURT: But you did receive an honorable discharge?

THE RESPONDENT: Yes, sir.

(9)

THE COURT: And by your own efforts, you completed high school and the employers you had all said that you were a good employee. I have also checked at the prison where you have been and your conduct there is reported as good during the past four years and some odd months that you have been there and that you have been using the educational and rehabilitation facilities that are available.

These are the factors which I have considered on the good side of the ledger which have frankly saved you from a sentence of life imprisonment.

The maximum term of imprisonment set by statute for the crime for which you have been found guilty is any term of years up to life imprisonment. I sentence you to be committed to the Michigan Corrections Commission at the State Prison of Southern Michigan in the township of Blackman, County of Jackson, State of Michigan, to be confined at such penal institutions of the State as it shall direct, under the provisions of the Michigan Code of Criminal Procedure and the Michigan Penal Code, and the State Department of Corrections and amendments thereto for a minimum of twenty-five years and a maximum of (10) fifty years from and after this date. Let the record show

in connection with this offense, that between the time that Mr. Payne was arrested and today, he has been detained either in the Berrien County jail or in State Prison since November 6, 1962. That was the date that he was arrested, is that right Mr. Brown?

MR. BROWN: November 5th, Your Honor.

THE COURT: November 5th 1962, and he shall especially receive credit on this sentence both maximum and minimum for all of that period of time which our clerk here will compute on the committment papers and which of course the Corrections Commission is aware of. In addition, the good time he has earned by credit while in State Prison will also be applied to him whether or not, Mr. Payne, you go towards your maximum or not as you know depends on your contacts while in prison.

I inform you that as a matter of your constitutional rights, you are entitled to an appellate review, that is, a review by a court higher than this, of your conviction. If you are not financially able to afford counsel for such an appeal, and you desire to appeal, this court will appoint for you without charge to you, and further such (11) counsel will be furnished such portions of the proceedings had in your case as counsel requires to prepare any post-conviction motions or to perfect an appeal.

If you wish such assistance of counsel, you must complete these forms which I now give you and file a copy of each with the court within 60 days from now and you must also give a copy of each to the office of Prosecuting Attorney of this County.

Will you please acknowledge receiving in duplicate an Affidavit of Financial Condition, Form 6404 and Petition for Appellate Counsel, 6402. Have you received them?

THE RESPONDENT: Yes, I have.

THE COURT: Any bond previously authorized in this case is cancelled and the Defendant is remanded to the Sheriff of Berrien County for the execution of sentence. That's all.

APPENDIX F — AFFIDAVIT OF JUDGE BYRNS

"In accordance with the direction of the Supreme Court of Michigan in the above cause, I, Chester J. Byrns, being first duly sworn, say that:

"1. I am and have been since January, 1, 1967, one of the judges of the Second Judicial Circuit of Michigan (Berrien County).

"2. Leroy Payne, defendant-appellant in the above cause, pled guilty on December 14, 1962, before the Honorable Philip A. Hadsell, Circuit Judge, now retired, to the crime of assault with intent to murder, and was sentenced to 19-40 years.

"3. On June 15, 1967, I suppressed a confession of Mr. Payne, set aside his guilty plea and granted him a new trial based on his claim that improper means were used by the police to secure his confession which he claimed was involuntary.

"4. On August 4, 1967, I granted Mr. Payne's motion for a change of venue and transferred and heard the jury trial in Grand Rapids (Kent County), Michigan, which resulted in a verdict of guilty of assault with intent to commit murder.

"5. During said trial I had the opportunity, which Judge Hadsell did not, to observe defendant for three days and, far more important, to hear many more of the details of the crime and Mr. Payne's participation in it than Judge Hadsell who, as the arraignment transcript shows, had only inquired of defendant whether the defendant committed the assault against Officer Yost with a gun with intent to kill and murder, to which Mr. Payne answered only 'yes.'

"6. Unlike Judge Hadsell who had Mr. Payne before him for only a few minutes at the time of plea and again at sentence, I had the opportunity to observe and hear Mr. Payne who took the witness stand and who was examined and cross-examined extensively. Mr. Payne's story and claim in trial of not being at all involved in the crime was in direct conflict with what

he told Judge Hadsell both at arraignment and at the plea of guilty where he not only admitted his crime but expressed sorrow and regret for it and showed thereby a remorse for his crime. At time of sentence Judge Hadsell said he believed Mr. Payne's claim of regret. At the time of sentencing by me on August 30, 1967, when given the opportunity to state anything he wished me to consider, Mr. Payne replied, 'Nothing.'

"7. At the jury trial before me Mr. Payne repeatedly denied under oath not only shooting Officer Victor Yost, but claimed under oath he was home with his wife and had while waiting earlier at church for his children at Sunday School gotten the gun used in the Yost shooting as security for a $3.00-loan to an unknown stranger and this gun and Payne's car were allegedly stolen the night of the shooting. This court believes this was a tissue of lies and so did the jury.

"8. Frankly, I was then and am now of the opinion that Mr. Payne repeatedly lied under oath at the trial before me. While a sentencing judge receiving a guilty plea and an expression of regret from a defendant might find remorse and a resolution to rehabilitate from such a defendant, which might limit the sentence, I could not so find this in Mr. Payne. I was charged with the judgment of determining how long an individual should be confined, which in turn depends on my judgment of his character and his real desire for rehabilitation according to the facts and impression I receive.

"9. At the trial of People v. Lionel Bradford (Berrien circuit No. X-768, Michigan Supreme Court No. 52072), a co-defendant with Payne, who was found guilty by jury of assault with intent to murder Charles Plummer (who was shot along with Officer Yost but who was out of the country at the trial of Mr. Payne) Plummer testified (Bradford trial transcript pp 49, 50, and 180) that while he (Plummer) was wounded and lying on the ground, Mr. Payne came back and stood by the left fender of the car and deliberately fired right at him.

"10. Payne testified at Bradford's trial (February 4, 1963) that Lionel Bradford and Payne were driving a 1955 blue and white 2-door Pontiac on November 5, 1962 in the early morning hours. After having broken into a restaurant in South Bend, Indiana, and a clothing store near Benton Harbor, Michigan, Payne testified that he and Bradford were stopped by a police vehicle on M-139. Bradford had told Payne he 'would not be taken.' As they stopped, Bradford and Payne jumped from their vehicle and began firing at the two officers, hitting both of them.

"Payne remembered going back to one of the officers but couldn't recall exactly what then happened. Both men subsequently jumped into their car and fled, Payne giving his gun to Bradford in a ravine and returning home where he (Bradford transcript pp 45-60) was subsequently arrested.

"On September 2, 1965, nearly three years after his sentence by Judge Hadsell and about two years before I granted him a new trial, Leroy Payne signed an affidavit supporting an appeal of Bradford claiming he gave 'false testimony' at the Bradford trial. He said that the only reason he testified at that trial was due to fear of the police, that Bradford never admitted committing crimes, and that Bradford had denied being present when the officers were shot. Further, Payne swore in his affidavit he had hardly known Bradford prior to being arrested, and that he had not been with Bradford on either the date of the shooting or the day before.

"11. At the Payne trial before me, in far greater detail than would have been present in a plea of guilty, it was established before me beyond a reasonable doubt that Mr. Payne had participated in the deliberate, cold-blooded attack upon and wounding three times of Officer Yost under conditions that Mr. Yost could not properly defend himself, which I felt then and do now showed a depravity of mind.

"12. I had the details of the nature of the wounds and the medical fight to save Officer Yost's life from Mr. Yost and from his surgeon, Dr. Robert Reagan,

as well as the residual and continuing damage to Mr. Yost, which Judge Hadsell on a plea of guilty would not have had.

"13. I had as a result of the trial and many facts brought out therein the conclusion that only by divine providence and not because of Mr. Payne was the life of Officer Yost saved.

"14. As stated at the time of sentencing, my increase in sentence to 25-50 years was not because the fendant asked for and got a new trial (which I granted) or a change of venue (which I granted), but because of the conditions and facts stated by me to Mr. Payne at the time of sentencing as well as the above matters which I do not believe were all known to Judge Hadsell.

"15. Further deponent says not.

[Subscribed, sworn, etc.]"